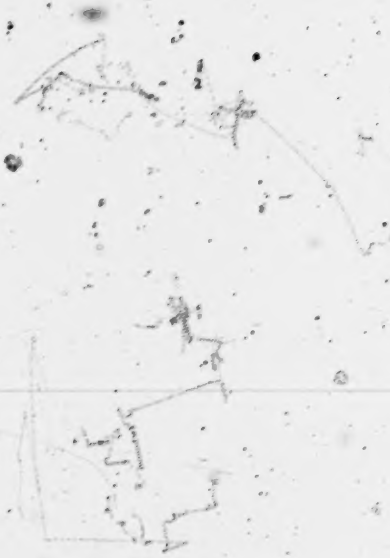

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 783

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

CASSIUS MARSELLUS CLAY, JR.,
also known as MUHAMMAD ALI,

Petitioner,

—v.—

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 6, 1970. Rehearing was denied on August 19, 1970.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is not yet reported and it is set out in the Appendix hereto, pp. 1a-16a. The opinion of the United States District Court for the Southern District of Texas is unreported and is set out in the Appendix, pp. 18a-27a.

The opinion of the Court of Appeals at an earlier stage of this proceeding is reported at 397 F.2d 901 and is set out in the Appendix, pp. 28a-75a. Petitioner was originally

convicted upon trial by jury in the United States District Court for the Southern District of Texas and no opinion exists with respect to that conviction. The District Court's oral finding of a basis in fact for petitioner's selective service classification is set out in the Appendix, pp. 77a-81a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 6, 1970 and a timely filed petition for rehearing and rehearing in banc was denied on August 19, 1970. By order signed September 15, 1970, Mr. Justice Black extended the time within which to file a petition for writ of certiorari until October 3, 1970. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented for Review

1. Whether the decision of the Court of Appeals is in conflict with the decisions of this Court in *Alderman* v. *United States*, 394 U.S. 165, and *Giordano* v. *United States*, 394 U.S. 310 (1969), and sets a confusing precedent for the administration of the rules laid down in *Alderman* by lower courts? This question subsumes the issues:

   (a) Whether the Court of Appeals erred in creating an undefined exception to the disclosure rule of *Alderman*?

   (b) Whether the Court of Appeals erred in holding that disclosure of the log of the fifth surveillance to petitioner was unwarranted solely on the basis of the Government's conclusory assertion that disclosure would prejudice the national interest?

(c) Whether the Court of Appeals erred in holding that *Alderman* does not require disclosure and a hearing in the case of wiretapping which violates § 605 of the Federal Communications Act?

2. Whether the decision of the Court of Appeals holding that electronic surveillance for the purpose of gathering "foreign intelligence information" does not violate the Fourth Amendment sanctions the irresponsible exercise by the Government of a dangerous and limitless power to invade an individual's privacy? This question subsumes the issues:

(a) Whether the decision of the Court of Appeals is in conflict with the many decisions of this Court holding that the Fourth Amendment bars any search and seizure unless at some point there has been an independent judicial determination of its reasonableness?

(b) Whether the exercise by the Attorney General of the power to engage in such electronic surveillance was unlawful because it lacked the explicit authorization of the President?

3. Whether petitioner has a right to have his draft status determined by a selective service board from which Negroes have not been systematically excluded and whether he can vindicate this right by refusing to submit to an induction order issued by an illegally constituted board?

4. Whether petitioner's conviction should be vacated in light of this Court's decision in *Welsh* v. *United States*, 398 U.S. 333 (1970), because the denial to petitioner of a conscientious objector exemption may have been based upon the Department of Justice's erroneous characterization of his objections to participation in war as "political and racial" rather than "religious?"

5. Whether petitioner's conviction should be reversed because there was no basis in fact for the denial to petitioner of an exemption as a minister for the Lost Found Nation of Islam on the ground that he was also a professional boxer?

Constitutional Provisions, Statutes and Regulations Involved

1. This case involves the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, the pertinent texts of which are set out in the Appendix, pp. 90a-91a.

2. It involves 47 U.S.C. § 605 (Federal Communications Act) and 50 U.S.C. App. §§ 451(c), 455(a), 456(g), 456(j), 460(b)(3) and 462(a) (Universal Military Training and Service Act), the pertinent texts of which are set out in the Appendix, pp. 91a-99a.

3. It also involves Selective Service Regulations, 32 C.F.R. §§ 1600.735-1, 1604.22, 1604.24, 1604.52, 1604.54, 1622.1, 1622.14, 1622.43, 1626.24, 1626.25 and 1627.1, the pertinent texts of which are set out in the Appendix, pp. 91a-107a.

Statement of the Case

A. *Trial, Conviction and First Appeal*

Petitioner Cassius Marsellus Clay, Jr., also known as Muhammad Ali, a black registrant of Selective Service Local Board No. 47, Louisville, Kentucky, was convicted on June 20, 1967 in the United States District Court for the Southern District of Texas of failing to submit to induction into the Armed Forces of the United States in

violation of 50 U.S.C. App. § 462 and sentenced to five years imprisonment and a $10,000 fine. He had been indicted on May 8, 1967 as a result of his refusal on April 28, 1967 to take the traditional "one step forward" which symbolizes induction into the Armed Forces.

Petitioner defended his refusal to submit on the ground that the systematic exclusion of Negroes from his own and all other draft boards in the States of Kentucky and Texas had rendered the induction order void. At trial he showed that in Kentucky only 0.2% of the draft board members were black even though 7.1% of the total population was black, and that in Texas only 1.1% of the draft board members were black even though 11.4% of the total population was black (App. p. 41a). He also contended that he had been erroneously denied conscientious objector and ministerial exemptions based upon his scruples against participation in war and his vocation as a minister for the Lost Found Nation of Islam. Without requiring the Government to rebut petitioner's *prima facie* case of racial discrimination in the selection of his draft boards, the District Court held that such discrimination did not constitute a defense to the charge. The court also found that there was a basis in fact for the denial to petitioner of the draft exemptions he claimed (App. p. 81a).

On appeal, the Court of Appeals rejected all of petitioner's claims and affirmed his conviction (397 F.2d 901; App. p. 28a). It held that systematic exclusion of Negroes from draft board membership was no defense in the prosecution of a Negro registrant for failing to submit to induction pursuant to an order issued by such an unrepresentative draft board. It likened a draft board from which Negroes had been excluded to a malapportioned legislature rather than to a criminal jury and concluded that such a body had *de facto* authority. Thus, even though

petitioner previously had sought in vain to enjoin his induction and to require the reapportionment of draft boards in Kentucky and Texas (App. pp. 34a-38a), the Court of Appeals held that he was not justified in refusing to submit to an induction order that was valid by virtue of the *de facto* authority of the draft board that issued it.

The court also affirmed the District Court's finding that there was a basis in fact for the denial to petitioner of ministerial and conscientious objector exemptions in evidence that petitioner was a professional boxer and that his objections to participation in war based upon the teachings of the Nation of Islam either did not satisfy the statutory requirements for exemption or were insincerely held (App. pp. 57a-68a). A petition for rehearing and rehearing in banc was denied in the Court of Appeals on June 6, 1968, and on July 7, 1968 petitioner filed a petition for certiorari in this Court.

B. *Remand by the Supreme Court*

Subsequent to the filing of its brief in opposition to the petition for writ of certiorari, the United States filed a supplemental memorandum in which it admitted that on five occasions petitioner had participated in conversations which had been monitored by electronic surveillance directed against other persons. On one of these occasions, it was stated, the overhearing occurred in the course of the gathering of "foreign intelligence information." (Supplemental Memorandum for the United States, pp. 1-2). Despite the Government's contention that the overhearing of petitioner's conversation could not have produced any of the evidence used to convict him for violating the Selective Service law (*id.* at p. 4), this Court, *sub nom. Giordano v. United States*, 394 U.S. 310 (1969), granted the petition for certiorari on March 24, 1969, and vacated the Court

of Appeals' judgment affirming his conviction. It remanded the case to the District Court for a determination of whether the electronic surveillance which overheard petitioner's conversations was unlawful and, if so, whether the evidence obtained thereby tainted his conviction. (*Id.* at 312.) This determination of taint was required to be made in conformity with *Alderman* v. *United States*, 394 U.S. 165 (1969), which required full disclosure of all "surveillance records as to which any petitioner has standing to object . . . without being screened in camera by the trial judge" (*id.* at 182), even though such disclosure was "attended by potential danger . . . to the national security" (*Id.* at 181).

C. *Proceedings on Remand and Reentry of Judgment of Conviction*

Upon remand, the logs of four conversations were disclosed to petitioner, and on June 2, 4, 5 and 6, 1969 the District Court conducted an adversary hearing to determine whether the fruits of the surveillance directly or indirectly tainted his conviction. The Government did not deny that these four logs were obtained illegally (App. p. 20a). The court found that the four logs contained nothing that was prejudicial to, or that was in fact used against, petitioner in connection with his Selective Service classification or with his conviction (App. p. 24a).

The Government submitted the log of the fifth surveillance to the District Court as a sealed exhibit to an affidavit executed by Attorney General Mitchell (App. p. 82a). According to the affidavit, petitioner's conversation had been overheard in June, 1965 "by government agents who were monitoring a wiretap which was being maintained for the purpose of gathering foreign intelligence information" (*Ibid.*). Included in this sealed exhibit was a descrip-

tion of the premises which were the subject of the surveillance. A second sealed exhibit to the affidavit contained a copy of a memorandum allegedly reflecting approval of the installation of the surveillance by the then Attorney General. In his affidavit, Attorney General Mitchell purported to submit the exhibits "solely for the court's *in camera* inspection" because "it would prejudice the national interest to disclose the particular facts concerning this surveillance other than to the court" (App. p. 83a).

Solely on the basis of this information, the District Court decided, after an ex parte, in camera inspection, that the surveillance from which the fifth log had been obtained was lawful under the Fourth Amendment because it was "for the purpose of gathering foreign intelligence information" and had been approved by the Attorney General (App. p. 27a). Pursuant to the statement of this Court in *Giordano* that "a finding by the district court that the surveillance was lawful would make disclosure and further proceedings unnecessary," 394 U.S. at 313, the court refused to disclose to petitioner the log of the fifth conversation and held an adversary hearing to determine whether it tainted his conviction (App. p. 26a). On July 24, 1969, the District Court entered a new judgment of conviction and resentenced appellant to five years' imprisonment and a fine of $10,000.

D. *Second Appeal*

The Court of Appeals again affirmed petitioner's conviction. It agreed with the District Court that the four disclosed logs were "so totally innocuous that they could not have had any bearing on the defendant's conviction under any circumstances" (App. p. 6a). With respect to the undisclosed log of the fifth surveillance, the Court of Appeals made three interrelated rulings. First, solely on

the basis of the conclusory affidavit of Attorney General Mitchell that "it would prejudice the national interest to disclose the particular facts concerning this surveillance other than to the court *in camera*" (App. p. 83a), it held that "the publication of the fifth log to defendant is unwarranted and would be contrary to the national interest" (App. p. 12a). Second, in spite of *Alderman's* disclosure requirement, it held that its own in camera inspection of the fifth log "establishes to our satisfaction that the contents of the wiretap were not germane to any issue in this criminal prosecution and conviction" (App. p. 12a). Finally, in an unprecedented decision, the Court of Appeals eschewed any independent judicial determination of the reasonableness of the fifth surveillance and affirmed the District Court's conclusion that it did not violate the Fourth Amendment because it had been maintained in connection with obtaining foreign intelligence information (App. pp. 13a, 15a).

Although petitioner had raised again all of the issues which had been decided against him on his first appeal, the Court of Appeals refused to reconsider its original decision. It did, however, conclude that this Court's decision in *Welsh v. United States*, 398 U.S. 333 (1970), did not affect this case even though the denial to petitioner of a conscientious objector exemption was based upon a Department of Justice recommendation that had characterized petitioner's objections to participation in war based on the teachings of the Nation of Islam as "political and racial" (App. p. 15a, n. 9).

On August 19, 1970, a petition for rehearing was denied by the panel of the Court of Appeals that decided the case and a majority of the members of the court in regular active service voted against a rehearing in banc (App. p. 17a).

REASONS FOR GRANTING THE WRIT

Introduction

Petitioner seeks review in this Court of two decisions of the United States Court of Appeals for the Fifth Circuit. The issues raised by the first decision affirming petitioner's conviction are appropriately raised now because this Court did not consider them when it vacated the Court of Appeals' judgment in *Giordano* v. *United States*, *supra*, and remanded petitioner's case to the District Court for further proceedings in conformity with *Alderman*. On appeal from the District Court's reentry of a judgment of conviction, petitioner urged the Court of Appeals to reconsider its first decision. With the exception of its consideration of the effect of this Court's decision in *Welsh* v. *United States*, 398 U.S. 333 (1970), however, it refused to reconsider its previous disposition on the ground that that decision was the law of the case (App. p. 16a). Thus, the issues raised in the Court of Appeals on both occasions may be properly brought before this Court for review at this time.

These issues are of enormous contemporary importance. They involve the conflict of fundamental rights of citizens with the most sweeping powers of government. At the heart of the controversy is the question of the extent to which an individual's rights under the First, Fourth and Fourteenth Amendments can constitutionally be abridged by the power of the government to raise armies and to engage in unlimited surreptitious electronic surveillance for the purpose of gathering "foreign intelligence information."

In the first decision, even though the Court of Appeals condemned the exclusion of Negroes from the Selective Service System (App. p. 44a), it invoked "the imperative necessity for the maintenance of the national integrity as

upheld by the military forces of the United States" to support its conclusion that petitioner could not challenge such exclusion as a defense in his criminal prosecution (App. p. 47a). And in the second decision, the Court of Appeals invoked the "imperative necessity for obtaining foreign intelligence information" to justify the creation of a dangerous and unprecedented exception to the guarantees of the Fourth Amendment (App. p. 15a). Thus, on two separate occasions petitioner has been the victim of illegal Government action and has been denied any redress out of a supposed "imperative necessity." Petitioner calls upon this Court to restore the balance established by the Constitution between his rights and the powers the Government claims are necessary for the national defense.

The fairness and regularity of the operations of the Selective Service System are of crucial importance in the lives of millions of Americans. Especially at a time when this Nation is engaged in a costly war, the system that selects men for service must be held to the highest constitutional standards. That racial discrimination in the appointment of draft board members continues to flaw seriously the integrity of this system, makes petitioner's case one which it is essential that this Court review.

The issues raised by the second decision of the Court of Appeals are equally important. It is the first authoritative decision by an appellate court dealing with the legality of Government electronic surveillance in national security cases and with the procedures for reconciling a defendant's right to disclosure of illegally obtained evidence and the Government's interest in secrecy. The decision sanctions the exercise by the Government of an essentially arbitrary power to intrude upon an individual's privacy and denies to the victim any opportunity for showing that the intrusion was illegal and prejudicial. The Court of Appeals' errone-

ous decision will undoubtedly have a widespread and significant influence in the development of the law in this area unless reversed by this Court.

One other issue decided by the Court of Appeals merits review by this Court. In its first decision the Court of Appeals found that there was a basis in fact for the denial to petitioner of a conscientious objector exemption despite the reliance by the Department of Justice on the "political and racial" source of petitioner's objections to participation in war in recommending rejection of his claim. In its second decision the court held that *Welsh* v. *United States, supra*, did not affect its previous ruling on petitioner's conscientious objector claim. Since the *Welsh* case makes clear that a "political and racial" foundation for conscientious scruples against participation in war may satisfy the statutory requirements for exemption, petitioner submits that his conviction should be vacated and the case remanded in light of *Welsh*.

I.

The Decision of the Court of Appeals Is in Conflict With the Decisions of This Court in *Alderman* v. *United States* and *Giordano* v. *United States* and Sets a Confusing Precedent for the Administration of the Rules Laid Down in *Alderman* by Lower Courts.

A. *The Court of Appeals Erred in Creating an Undefined Exception to the Disclosure Rule of Alderman*

In *Alderman* v. *United States, supra,* this Court laid down the general rule that all records of illegal electronic surveillance to which a defendant has standing to object must be disclosed to him and an adversary hearing held to determine whether his conviction was tainted thereby. That such disclosure might prejudice the national interest was held not to justify an in camera screening of surveillance records by the trial judge to identify only those that are arguably relevant for disclosure to the defendant. In *Giordano* v. *United States, supra,* this Court specifically remanded this case to the District Court for proceedings in conformity with *Alderman.*

Even though petitioner clearly had standing to object to the fifth surveillance under *Alderman,*[1] the Court of Appeals held that it could properly make an in camera determination that the surveillance was not arguably relevant to petitioner's conviction because disclosure of the log to petitioner would prejudice the national interest. Thus, the Court of Appeals created an exception to the disclosure rule of *Alderman.* But, its opinion provides no rationale for the exception and fails to distinguish *Alderman* in any way.

---

[1] *Alderman* held that any party to a conversation that is overheard by illegal electronic surveillance has standing to object. 394 U.S. at 176.

The court simply held:

> "Under the circumstances here, publication of the fifth log is unwarranted and would be contrary to the national interest, having been obtained in foreign intelligence surveillance. The Court's in camera examination of the fifth log establishes to our satisfaction that the contents of the wiretap were not germane to any issue in this criminal prosecution and conviction. There has been no use against the defendant of the information gained by the Government by the fifth wiretap and the information there obtained would not have been of assistance to the prosecution in constructing a case against defendant. There is no indication that the information was or could be used in any way against defendant." (App. pp. 12a-13a).

The position of the Court of Appeals, therefore, is identical to the position of the dissent in *Alderman,* flatly rejected by this Court, that in camera determinations should be permitted in cases where disclosure would prejudice national security. Indeed, since Mr. Justice Harlan favored in camera proceedings only where the defendant had been indicted or convicted for espionage, thus creating a reasonable probability that he could not be trusted to preserve the secrecy of the disclosed material, it would appear that eight members of this Court would have required disclosure of the contents of the fifth surveillance to petitioner, who was convicted only of a Selective Service law violation.

Nothing this Court said in *Alderman,* moreover, suggests a basis for distinguishing petitioner's case. The fact that the log of only one surveillance was considered in camera cannot support this result. On the contrary, the one log might contain the "apparently innocent phrase, a chance remark, a reference to what appears to be a neutral

person or event" that this Court considered potentially significant in the determination of taint. 394 U.S. at 182. Other reasons suggested by the record for distinguishing petitioner's case from *Alderman*—the fact that the surveillance was not directed at petitioner, or the lack of any obvious connection between any tainted evidence and a conviction for refusal to submit to induction—fail to supply any rationale for the distinction. For when the Solicitor General informed this Court of the existence of the logs of petitioner's conversation, he took pains to point out that the surveillance had not been directed at petitioner, that only five logs were involved, and that the overhearing had taken place years prior to his conviction. He argued that the possible connection between the conversations and a Selective Service law violation was so slight that they could not possibly have produced any of the evidence used to convict petitioner. But this Court's action in vacating petitioner's conviction *sub nom., Giordano* v. *United States, supra,* and remanding for proceedings in conformity with *Alderman* to determine whether the logs tainted this conviction was at least a tacit rejection of the Government's arguments.

Thus, the Court of Appeals has not only created an exception to the *Alderman* disclosure requirements but in failing to provide a rationale has deprived this and other courts of any basis upon which to evaluate and administer the exception. The Court of Appeals rejected the explicitly articulated premise of *Alderman* that the difficulty in distinguishing between records that are, and those that are not, arguably relevant to a showing of taint requires full disclosure of all illegal evidence. But, the court supplies no analysis of how and where to draw the line. Instead, in holding that in camera determinations of arguable relevance may be made under some undefinable circumstances the court creates an exception to *Alderman's* dis-

closure rule that is as broad as the rule itself. Since the factual predicate of the decision cannot be disclosed, other courts and litigants can only guess at the meaning of the decision.

The effect of such a jurisprudence where courts fail to disclose the basis of their decisions for fear of prejudice to the national security will be to create confusion among lower courts and make the rational administration of the *Alderman* rules impossible. Indeed, the only way to assure uniformity in the application of *Alderman* under such circumstances is for this Court to grant review in every case of nondisclosure.

Petitioner submits that this Court should grant review in this case to affirm that *Alderman* means what it very clearly says. The task is too difficult and the possible prejudice to the defendant too great to make exceptions to the requirement of full disclosure of all records of illegal surveillance to which a defendant has standing to object.

But even if this Court is of the opinion that the *Alderman* requirements should not be absolute and unyielding, it should nevertheless grant review to articulate under what circumstances an in camera proceeding to determine "arguable relevance" may be proper. If the Court of Appeals' decision, which is the first authoritative application of the *Alderman* rules in a "national security" case, is allowed to stand, the certainty of the procedures for dealing with records of illegal electronic surveillance established by *Alderman* will be lost. Courts will be free to read *Alderman* as broadly or as narrowly as they see fit since there will be no effective way to assure its uniform application. This Court should not tolerate the introduction of such confusion and uncertainty into the system of criminal justice.

B. *The Court of Appeals Erred in Holding That Disclosure of the Log of the Fifth Surveillance to Petitioner Was Unwarranted Solely on the Basis of the Government's Conclusory Assertion That Disclosure Would Prejudice the National Interest.*

If *Alderman* v. *United States, supra,* is to allow of an exception to its disclosure rule when disclosure might prejudice the national interest, it is essential that there be an independent judicial determination that the Government's interest in secrecy outweighs the accused's Sixth Amendment rights of confrontation and cross-examination. Any deviation from the adversary hearing mandated by *Alderman* for determining whether a conviction is tainted by illegal surveillance should not be lightly allowed. Only the "clearest and most compelling considerations" can ever justify such an infringement upon the deeply-rooted guarantees of the Sixth Amendment. *Dennis* v. *United States,* 384 U.S. 855, 873 (1966); see *Green* v. *McElroy,* 360 U.S. 474 (1959); *Pointer* v. *Texas,* 380 U.S. 400 (1965).

Yet, the court below relied entirely upon the conclusory assertion in the affidavit of Attorney General Mitchell for its finding that disclosure of the log of the fifth surveillance to petitioner would prejudice the national interest. Indeed, it merely quotes a portion of the Attorney General's affidavit as justification for its in camera inspection of the log for relevance (App. p. 11a).

Petitioner submits that an independent judicial determination of the necessity for nondisclosure is required to guarantee to a defendant that his Sixth Amendment rights will not be abridged without adequate justification. The reliance by courts upon a conclusory assertion by the Government would condition a defendant's rights upon the unreviewable statements of his adversary. Such a result clearly violates the many injunctions of this Court that

require careful balancing of the rights of the individual with the concerns of the Government before upholding a claim of governmental privilege. See *Roviaro* v. *United States*, 353 U.S. 53 (1957); *Dennis* v. *United States*, 384 U.S. 855 (1966); *Jencks* v. *United States*, 353 U.S. 657 (1957); *Campbell* v. *United States*, 365 U.S. 85 (1961).

The decision of the Court of Appeals falls far short of what even the dissenters in *Alderman* would require as a predicate for an in camera determination of relevance. Although Justices Harlan and Fortas would agree with the Court of Appeals that there should be an exception to the requirement of *Alderman* that all logs to which a defendant has standing to object be disclosed to him, they would nevertheless require that the trial judge assure himself that in camera proceedings were justified by a compelling national security interest. Mr. Justice Harlan would "lay upon trial judges the affirmative duty of assuring themselves that the national security interests claimed to justify an in camera proceeding are real and not merely colorable" and subject their decisions "to the most searching scrutiny on appeal." *Alderman* v. *United States*, 347 U.S. 165, 199, 200 (1969). And Mr. Justice Fortas would not permit in camera proceedings unless "the trial court explicitly determines, in written findings, sealed and available for examination by reviewing courts, that disclosure would substantially injure national security interests." *Id.* at 209-10.

Neither of the rulings of the courts below bear any resemblance to this manner for determining the necessity for nondisclosure. Both courts looked no further than the Attorney General's statement that the surveillance was for the purpose of gathering foreign intelligence information and that disclosure "would prejudice the national

interest." Thus, not only did the courts below fail to make any explicit findings that can be reviewed on appeal, but the affidavit of the Attorney General is on its face insufficient even by the standards of the dissenters in *Alderman* to justify in camera proceedings. He alleges only that the "national interest" rather than a "real national *security* interest" is involved and he merely asserts that this interest will be "prejudiced" rather than "substantially injured."

The importance of a searching judicial inquiry into the basis of the government's claim of privilege cannot be overemphasized. Without it the bare claim of privilege based on "prejudice to the national interest" may mask insubstantial reasons for curtailing a defendant's right to disclosure. This is clearly demonstrated in the record below where the Government initially sought a nonpublic hearing in the District Court on the issue of whether the four surveillance logs that were disclosed to petitioner tainted his conviction. The Government's fanciful justification for denying petitioner the important right to a public hearing, see *In Re Oliver,* 333 U.S. 257 (1948), was that a public hearing would endanger the *national security* because "there are militant members who will attempt to use any excuse to stir up [trouble] . . . the danger to the national security is . . . that some people may attempt to use the fact that people who have stated strong opposition to our government and the form of our government, will use the fact of these surveillances to stir up more trouble." (Transcript of Proceeding in Closed Court, p. 7).

Petitioner contends that his right to disclosure of the log of the fifth surveillance cannot be concluded by the Government's claim of privilege without, at a minimum, an independant judicial determination that the *bona fide* purpose of the surveillance was to gather foreign intelligence and that disclosure of the log to him would substantially

injure national security interests. As this Court has said in a similar situation, the Government must "satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953).

This determination, moreover, should be made on the basis of an adversary hearing at which the Government must make some factual showing as to why disclosure would seriously threaten national security and the defendant is given an opportunity to rebut it. Although in such a case it might be proper to limit adversary scrutiny into the Government's claim of privilege so that its object would not be defeated, *United States* v. *Reynolds, supra*, 345 U. S. at 8, there must nevertheless be enough of an inquiry to show that the claim is justified. This proceeding, which may include the taking of extrinsic testimony, is the only way to insure that the trial judge's ruling is based upon the fullest possible knowledge of all of the relevant circumstances, *Campbell* v. *United States*, 365 U. S. 851 (1961). No less can be required as a prerequisite for depriving a defendant of his right to disclosure, the importance of which this Court recognized in *Alderman*.

In the absence of some determination of what constitutes "foreign intelligence gathering" and of what "prejudice to the national interest" justifies an in camera proceeding, lower courts have no guidance in deciding future cases of this nature. If there is to be any exception allowed to the *Alderman* disclosure rules it is essential that courts be provided with some standards by which they can evaluate the basis of claims of privilege urged by the Government. The Court of Appeals' decision abdicates any such inquiry and instead relies upon

the unchallengable assertions of the Government. This Court, therefore, should grant review and reverse the decision of the Court of Appeals. It must be made clear that if the crucial values of the adversary system are ever to be dispensed with, a court must first assure itself that a substantial injury to national security will occur by disclosure of information to a defendant.

C. *The Court of Appeals Erred in Holding That Alderman Does Not Require Disclosure and a Hearing in the Case of Wiretapping Which Violates §605 of the Federal Communications Act.*

Petitioner contended below that regardless of whether the fifth surveillance violated the Fourth Amendment, *Alderman* required full disclosure of the fifth log because the surveillance was illegal under § 605 of the Federal Communications Act, 47 U.S.C. § 605.[2] Although this Court in *Alderman* only addressed itself to surveillance that was illegal under the Fourth Amendment, petitioner argued that the rationale of *Alderman* applied equally where the surveillance violated the Federal Communciations Act. The Court of Appeals, however, appeared to hold that § 605 does not require disclosure and a hearing under *Alderman*.[3]

[2] In his affidavit, the Attorney General admitted that the fifth surveillance was a wiretap (App. p. 82a). At the time of the surveillance of petitioner, wiretapping was not considered to be a violation of the Fourth Amendment unless a trespass of a constitutionally-protected area was involved. See *Katz* v. *United States*, 389 U.S. 347 (1967).

[3] Of course, the Court of Appeals may have only have concluded that an in camera determination of relevance was permissible regardless of whether the surveillance violated the Fourth Amendment or § 605. The court's specific discussion of § 605, however, as we point out *infra*, indicates that it may have distinguished between Fourth Amendment and § 605 cases insofar as disclosure under *Alderman* is concerned. Since petitioner contends that § 605 is an independent basis for disclosure under *Alderman*, this aspect of the court's opinion deserves this separate treatment.

The court did not explain its ruling as to why a different result should obtain where § 605 rather than the Fourth Amendment was involved. But its discussion of the construction of § 605 under which interception *and* use or publication, but not interception alone, is considered a violation of the statute suggests what the court may have thought provided a basis for the distinction it created (App. pp. 13a-14a). Since the court determined on the basis of its in camera inspection that there had been no use or publication of the log of the fifth surveillance, it might then have concluded that there had been no violation of § 605. And since *Alderman* only requires disclosure of records of illegal surveillances, *Giordano* v. *United States*, 394 U. S. 310, 311 (1969), there would be no need to turn over to petitioner the log of the fifth surveillance. Thus, the court might have reasoned that it had only made an in camera determination of the *legality* of the surveillance—which Mr. Justice Stewart pointed out in *Giordano* (394 U.S. at 314), had not been foreclosed by this Court.[1] Because of the peculiar construction of § 605, however, the determination of legality was at the same time a determination of whether the surveillance was relevant to the conviction.

Neither this nor any other reasoning can justify not applying the *Alderman* disclosure rules to a case where only wiretapping, rather than a surveillance that violated the Fourth Amendment, is involved. The interest of a defendant in the full disclosure of evidence that cannot legally be used against him and the complexity of the determination of whether the evidence is relevant to his

[1] In the court below, petitioner argued that the determination of legality, as well as the determination of relevance, "is too complex, and the margin of error too great, to rely wholly on the in camera judgment of the trial court". *Alderman* v. *United States*, *supra*, 394 U.S. at 182.

conviction is just as great when there has been a wiretap as when there has been an unconstitutional surveillance.[5] In light of the fact that the exclusionary rule of § 605 has always been equated with the exclusionary rule of the Fourth Amendment, see *Alderman* v. *United States*, *supra*, 394 U. S. at 172; *Benanti* v. *United States*, 355 U. S. 100 (1957); *Goldstein* v. *United States*, 316 U. S. 114 (1942); *Coplon* v. *United States*, 185 F.2d 629 (2d Cir. 1950), *cert. denied*, 342 U. S. 920 (1951), it would be anomolous to permit in camera determinations of whether evidence tainted a conviction in wiretapping cases on the pretext of deciding the legality of the wiretap while requiring full disclosure in Fourth Amendment cases. Petitioner submits that *Alderman* must be read to require full disclosure and an adversary hearing to determine taint in any case where evidence resulting from electronic surveillance could not legally be used by the Government in building a case against a defendant, regardless of whether the interception was illegal under the Fourth Amendment or whether its interception *and* use or publication would be illegal under § 605.

In view of the obscurity of the Court of Appeals' opinion, petitioner cannot be sure that the court intended to draw such an untenable distinction as to the application of *Alderman* in wiretapping and in Fourth Amendment cases. It is certain, however, that petitioner's confusion as to what the Court of Appeals decided in this case will be mirrored by the many courts and litigants who will have to grapple with these elusive issues in the futre. For this reason, this Court should grant review

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[5] Indeed, the determination of "legality" in a wiretapping case would be more complex than the determination of "arguable relevance" that this Court disallowed in *Alderman*. It would involve a decision of the ultimate issue as to whether the evidence was in fact used rather than whether it might be arguably relevant.

so as to clarify the meaning of the *Alderman* decision and to set clear standards for compliance with it by lower courts.

II.

The Decision of the Court of Appeals Holding That Electronic Surveillance for the Purpose of Gathering "Foreign Intelligence Information" Does Not Violate the Fourth Amendment Sanctions the Irresponsible Exercise by the Government of an Unprecedented and Limitless Power to Invade an Individual's Privacy.

A. *The Decision Is in Conflict With the Many Decisions of This Court Holding That the Fourth Amendment Bars Any Search and Seizure Unless at Some Point There Has Been an Independent Judicial Determination of Its Reasonableness.*

Both courts below decided the novel and important issue of the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information.[6] As Mr. Justice Stewart pointed out in his concurring opinion in *Giordano* v. *United States*, 394 U. S. 310, 314 (1969), it is an issue to which this Court has never addressed itself. It is, moreover, an issue of the utmost significance since it requires a balancing of the most precious individual rights with what is perhaps one of the most compelling governmental interests—self-preservation.

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[6] Since both the Court of Appeals and the District Court decided the issue of the legality under the Fourth Amendment of the electronic surveillance maintained for the purpose of gathering foreign intelligence information, we must assume that the surveillance was "trespassory" under the then prevailing constitutional standards. See *Kaiser* v. *New York*, 394 U. S. 244, 282 (1969). Otherwise, it would have been unnecessary for the courts below to have decided this difficult and important constitutional issue of first impression.

The District Court held that the fifth surveillance did not violate the Fourth Amendment even though it made no independent determination that the surveillance had been reasonable and even though there had been no prior authorization of the surveillance by a judicial warrant. Instead, the court concluded that where surveillances have been authorized by the Attorney General for the purpose of gathering foreign intelligence information "the judiciary should [not] question the decision of the executive department that such surveillances are reasonable and necessary to the protection of the national interest" (App. p. 27a). On appeal, based only upon the Government's assertion that foreign intelligence gathering was involved, the Court of Appeals concluded simply that: "We . . . discern no constitutional prohibition against the fifth wiretap" (App. p. 13a). And this extraordinary ruling was accompanied only with the terse explanation that:

> "No one would seriously doubt in this time of serious international insecurity and peril that there is an imperative necessity for obtaining foreign intelligence information, and we do not believe that such gathering is forbidden by the Constitution . . . ." (App. p. 15a).

With respect to a judicial determination of the reasonableness of the surveillance, the court held that such "judicial inquiry would be improper and should not occur" (App. p. 13a).

Thus, for the first time federal courts have abdicated completely their constitutional responsibility for assessing the reasonableness under the Fourth Amendment of a search and seizure. By eschewing any independent judicial determination whatsoever of the reasonableness of electronic surveillance by the Government, the courts below have in effect suspended the Fourth Amendment in

cases where foreign intelligence gathering is involved. And in so doing they have ignored the premise that has been firmly established by this Court in countless decisions that:

> "The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in the light of the particular circumstances." (*Terry* v. *Ohio*, 392 U. S. 1, 21 (1968))

The courts below legitimized a sweeping invasion of privacy that recalls the "executive" warrants which were denounced by James Otis in 1761 as the "worst instrument of arbitrary power." *Boyd* v. *United States*, 116 U. S. 616, 625 (1886). They announce a doctrine that is at war with what the framers of the Constitution had in mind when they drafted the Fourth Amendment. For at that time the tyranny of the Crown's suppression of alleged subversives and nonconformists uncovered by means of general searches of private papers and documents was of recent vintage. And so, too, was the landmark case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765), where the court had held the British Secretary of State liable for a trespass growing out of a search and seizure of papers thought libelous and subversive of public order which he had authorized by the issuance of a "writ of assistance." See *Boyd* v. *United States*, *supra*, 116 U. S. at 626-30.

There is not, nor can there be, a general exception to the constitutional guarantees of personal liberty and security embodied in the Fourth Amendment based upon the defense of the "national security" or the exercise of "war powers" by Congress or the Executive. As this Court has said:

> ". . . the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. 'Even the war power does not remove constitutional limitations safeguarding essential liberties' [citation omitted.]
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> * * *
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> "[T]his concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power . . . . Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its constitution, ... It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the nation worthwhile." (*Robel* v. *United States*, 389 U.S. 258, 263-64 (1967).)

The powers of the Executive to authorize electronic surveillance for the purpose of gathering foreign intelligence information must, therefore, be exercised in accordance with the Fourth Amendment which requires a judicial determination of the reasonableness of any governmental invasion of a citizen's personal security. But in rejecting the Fourth Amendment's limitations, the courts below appeared to conclude that courts were completely unable to make such determinations. The District Court thought that:

> "It would not be feasible for the executive to bring to the court's attention all the factual and policy considerations supporting the decision [to utilize electronic surveillance]. Moreover, it is the executive, not the judiciary, which alone possesses both the expertise

and the factual background to assess the reasonableness of the surveillance." (App. p. 27a).

In similar vein, the Court of Appeals said that it "would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret'," quoting from *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948). (App. p. 13a).

It is no doubt true that the reasonableness of foreign intelligence surveillance, which involves the accumulation and collation of a great deal of superficially irrelevant information with the view toward the discovery of espionage activities, cannot be evaluated in the conventional terms of whether there is probable cause to believe that a certain surveillance will disclose evidence of a particular crime. See *Katz* v. *United States*, 389 U. S. 347 (1967); *Osborn* v. *United States*, 385 U. S. 232 (1966); *Berger* v. *United States*, 385 U. S. 41 (1967). But this does not justify the holdings of the courts below that the Fourth Amendment has no meaningful application in this area. This Court has recognized that the standards of "probable cause" may vary depending upon the nature of the governmental interest to be served by a search. The Fourth Amendment's warrant procedure:

> "is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest . . . If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." (*Camara* v. *Municipal Court*, 387 U. S. 523, 529 (1967))

When foreign intelligence surveillance is likely to disclose information that is essential to the national security,

therefore, there may be "probable cause" to justify an intrusion upon the constitutionally protected interests of private citizens. This determination is of crucial importance because the individual interests at stake are among the most fundamental in a constitutional system. Not only is electronic surveillance the most extreme intrusion yet devised upon the right of personal privacy and security, but it constitutes a serious infringement of the rights protected by the First Amendment. Mr. Justice Brennan has pointedly observed:

> "Electronic surveillance strikes deeper than at the ancient feeling that a man's home is his castle; it strikes at freedom of communication, a postulate of our kind of society . . . [F]reedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office . . . If electronic surveillance by government becomes sufficiently widespread, and there is little prospect for checking it, the hazard that as a people we may become hagridden and furtive is not fantasy." (*Lopez* v. *United States*, 373 U. S. 427, 470 (1963) (dissenting opinion))

To hold, as did the courts below, that the balance between the need to gather foreign intelligence by electronic surveillance and these individual interests must always be struck in favor of the Government without any judicial inquiry is to denigrate this Nation's most cherished values. And to explain such a decision on the grounds that courts are institutionally incapable of balancing the conflicting interests is to ignore the historic functions of the courts. *Cf. Barenblatt* v. *United States*, 360 U. S. 109 (1959); *Baker* v. *Carr*, 369 U. S. 186 (1962).

The reasoning of the courts below that courts do not have the expertise to evaluate the factual and policy con-

siderations in any decision to employ electronic surveillance is no more persuasive than the argument advanced in *Camara* v. *Municipal Court, supra*, that courts could not function effectively in the field of municipal health and safety inspections because the "decision to inspect is based upon legislative or administrative assessment of broad factors . . ." 387 U. S. at 532. In rejecting this contention, this Court concluded that where the exercise of an indispensably important governmental power would "be greatly hobbled by the blanket requirements of safeguards necessary for a search of evidence of criminal acts" the:

> "'official need not show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime. Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify an inference where a criminal investigation has been undertaken. . . . The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought'." (387 U. S. at 537-38, quoting from *Frank* v. *Maryland*, 359 U. S. 360 (1959) (Douglas, J. dissenting opinion.))

Similarly, instead of the standard in the criminal case of whether there is probable cause that a search will discover evidence of a crime, in the case of foreign intelligence surveillance the inquiry would be whether there is probable cause that the surveillance will disclose information essential to national defense and security. While it might be reasonable under such a standard to permit electronic surveillance of a foreign embassy that has frequently been involved in espionage activities, it is hard to conceive of circumstances under which it would have been reasonable

to install wiretaps on the phones of Dr. Martin Luther King, Jr. or Elijah Muhammad. Once it is recognized that the elements of "probable cause" may be of a different nature with respect to foreign intelligence surveillance, it is apparent that the judiciary is no less able than the executive to evaluate its reasonableness. Only the detachment and neutrality of a judicial officer, moreover, can fully protect the rights of the individual against the competing claims of the Government.

The only case cited by either of the courts below in support of their refusal to test the reasonableness of the Government surveillance was *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U.S. 103 (1948), cited by the Court of Appeals (App. p. 13a). But it is completely inapposite. There, this Court merely held that the control of the decisions of the Civil Aeronautics Board with respect to international air routes committed to the President by statute was final and could not be reviewed by a court. In choosing to place the final decision on such matters within the unfettered discretion of the President, Congress recognized that his decision must be based on foreign policy considerations that were not amenable to judicially manageable standards. Whereas judicial review of executive decisions may not be necessary in the case of a statutorily created franchise, neither Congress or the Executive may dispense with the constitutional requirements of the Fourth Amendment.

Finally, the Court of Appeals can derive no support from the concurring opinion of Mr. Justice White in *Katz* v. *United States*, 389 U. S. 347, 362 (1967). Mr. Justice White only expressed the view that the Fourth Amendment does not require a warrant procedure in national security cases. He did not intimate, as suggested by the Court of Appeals (App. p. 10a), that foreign intelligence

surveillance is immune from any requirement of reasonableness under the Fourth Amendment.

Since the courts below held that the fifth surveillance was lawful under the Fourth Amendment without any independent judicial determination of its reasonableness, the issue as to the procedure by which such a determination should be made was not considered and is not directly at issue here. Notwithstanding Mr. Justice White's concurrence in *Katz* v. *United States, supra*, however, petitioner sees no reason why the reasonableness determination should not be made in a modified warrant procedure similar to that mandated by this Court in *Camara* v. *Municipal Court, supra* and *Davis* v. *Mississippi*, 394 U.S. 721 (1969). It is clear that none of the established exceptions to the warrant requirement of the Fourth Amendment are applicable. No search incident to an arrest is involved, *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); there is no emergency endangering lives, *Warden* v. *Hayden*, 387 U.S. 294 (1967); *Terry* v. *Ohio*, 392 U.S. 1 (1968); and there is no risk of irretrievable loss of evidence, *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Schmerber* v. *California*, 384 U.S. 757 (1966). And the only basis for suggesting that the warrant requirement itself is likely to frustrate the governmental purpose behind the search, *Camara* v. *Municipal Court, supra*, 387 U.S. at 533, is that the judges who would issue ex parte warrants cannot be trusted. Yet, the in camera disclosure of national security information to the courts below in this very case presupposes confidence in the federal judiciary.

On the other hand, the alternative to a warrant procedure for national security surveillance provided in § 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2511(3)) may also meet constitutional standards. There Congress provided that the "contents of

any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers [to engage in electronic surveillance in order to protect national security] may be received in evidence *only where such interception was reasonable . . .*" (emphasis added). This determination, according to the Senate Committee Report, must be "based on an ad hoc judgment taking into consideration all of the facts and circumstances of the individual case, which is but the test of the Constitution itself (*Carroll* v. *United States*, 267 U.S. 132)." 2 U.S. Code Congressional and Administrative News, 90th Cong., 2d Sess., 1968, p. 2183.[7]

In any event, the courts below erred in upholding the legality of the fifth surveillance in the absence of a warrant or of any other independent judicial determination of the reasonableness of the surveillance. This Court should grant review to affirm the historic principle of our jurisprudence that no man, not the President or the Attorney General, is above the law. The Fourth Amendment of the Constitution requires a judicial determination at some point as to whether electronic surveillance which trenches upon the rights of an individual is justified by an overriding governmental interest.

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[7] In the Court of Appeals, it was argued that any determination of the legality of the fifth surveillance must be made on the basis of an adversary hearing with disclosure of such facts as are necessary to assess the reasonableness of the surveillance (see Brief for *Amicus Curiae*, p. 41). Since the court upheld the legality of the surveillance without *any* determination as to its reasonableness, it is unnecessary to decide at this point how such a determination should be made.

B. *The Exercise by the Attorney General of the Power to Engage in Electronic Surveillance Was Unlawful Because It Lacked the Explicit Authorization of the President.*

The Government's entire argument as to the legality of foreign intelligence surveillance is premised upon the authorization of such surveillance by the President in the exercise of his constitutional authority to conduct foreign affairs and as Commander-in-Chief of the Armed Forces. But this Court need not reach the issue of whether the President has the constitutional power to engage in electronic surveillance without regard to the Fourth Amendment's requirement of judicial supervision. This is so simply because the exercise of any such power has never in fact been explicitly authorized by the President. In the absence of such authorization, a court should hesitate to sanction conduct that trenches so heavily on the rights of citizens. *Kent* v. *Dulles*, 357 U.S. 116 (1958); *United States* v. *Rumley*, 345 U.S. 41 (1953); *Watkins* v. *United States*, 354 U.S. 178 (1957).

The Government relies entirely upon several confidential memoranda as constituting a delegation by the President to the Attorney General of his "constitutional power" to engage in warrantless electronic surveillance. The documents themselves, however, cannot support such a contention. None of the memoranda purport to authorize electronic surveillance that would otherwise violate the Fourth Amendment.

The memorandum from President Roosevelt (App. p. 84a) appears only to authorize the Attorney General to engage in wiretapping which, prior to *Katz* v. *United States*, *supra*, was not considered to be a search and seizure. Since the letter of Attorney General Clark, concurred in by President Truman (App. p. 86a), relies upon President Roosevelt's prior memorandum, it can also only

be taken as authorization to the Attorney General to engage in wiretapping. Finally, the memorandum for the heads of executive departments and agencies from President Johnson, dated June 30, 1965 (App. p. 88a), which was closest in time to the fifth surveillance, provides the least support for the Government's position. It clearly delegates to the Attorney General the power to authorize wiretapping in connection with investigations related to the national security. With respect to the "[u]tilization of mechanical or electronic devices to overhear non-telephone conversations," however, the President merely expressed a "desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others" (App. p. 89a). Thus, while this memorandum authorized wiretapping in conformance with existing practices, it evidences an unmistakable intention to prohibit all other electronic surveillance that is not "fully in accord with the law."

Nothing in any of these memoranda even remotely approaches an authorization by the President to the Attorney General to engage in electronic surveillance in national security investigations which would, in any other type of case, violate the Fourth Amendment to the Constitution. The issue here, then, is not whether the President has the constitutional power to authorize such surveillance, but whether he has, in fact, done so. Petitioner submits that he has not.

In a closely analogous situation, also involving a conflict between national security interests and individual rights, this Court refused to find that the President had authorized a procedure which deprived a government employee of a right to confront witnesses and evidence against him in a security clearance hearing in the absence of evidence that the President "specifically has decided that the imposed

procedures are necessary and warranted . . ." *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959). Similarly, this Court has restrained the exercise of congressional investigative power which encroached upon individual rights of speech and privacy in the absence of an explicit mandate. It has concluded that "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter * * * Protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need." *Watkins* v. *United States*, 345 U.S. 178, 198, 205 (1957). And in *United States* v. *Rumely*, 345 U.S. 41, 46 (1953), this Court held:

> "Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits."

The same principles are applicable to the exercise in the present case of an asserted "constitutional" investigative power of the President to engage in electronic surveillance for the purpose of gathering foreign intelligence information. Since such surveillance raises constitutional problems of the highest magnitude respecting rights protected by the First and Fourth Amendments, it should not be sanctioned by courts in the absence of "careful and purposeful consideration by those responsible for enacting and implementing our laws," *Greene* v. *McElroy*, *supra*, 360 U.S. at 507. Since it is clear that there was no explicit delegation of authority from the President to the Attorney General to engage in electronic surveillance that otherwise violated Fourth Amendment standards, this Court need go no further than to hold the unauthorized exercise of the power to have been illegal.

III.

Petitioner Has a Right to Have His Draft Status Determined by a Selective Service Board From Which Members of His Race Have Not Been Systematically Excluded and He Cannot Constitutionally Be Convicted for Failing to Submit to an Induction Order Issued by an Illegally Constituted Board.

The systematic exclusion of Negroes from draft board membership throughout the country and particularly in the South remains as an ugly blot on a society that has otherwise made such progress in rooting out the official sources of racial discrimination. It is intolerable that what is perhaps the single most powerful institution in this country should operate in a way that excludes a large minority of citizens from representation. Despite the elimination of the racially discriminatory practices that have denied black people full participation in the institutions of government, the Selective Service System continues to deny them virtually any participation in the process by which they are asked to fight, and perhaps die, for their country.

The Court of Appeals held that petitioner's contention that Negroes had been systematically excluded from the selective service draft boards that classified and ordered him to report for induction was no defense in a criminal prosecution for refusing to submit to the induction order issued by such a board. Although petitioner's *prima facie* showing that there had been systematic exclusion of Negroes from local and appeal draft boards in both Kentucky and Texas was unrebutted by the Government and unquestioned by the Court of Appeals, the court held that such draft boards, like malapportioned legislatures, possess *de facto* authority to perform all the services required of them under the Selective Service law.

Petitioner submits that this was error; that he has a constitutional and statutory right to have his draft status determined by a board from which members of his race have not been systematically excluded; and that he may vindicate this right by refusing to obey an induction order issued by an illegally constituted board.

As long ago as 1880, this Court held that the "apprehended existence of prejudice" to a Negro defendant who had been tried before a jury from which Negroes had been systematically excluded was enough, in itself, to invalidate his conviction. Thus, this Court held that the possibility that the discriminatory exclusion of Negroes from a jury may prejudice a Negro defendant requires the reversal of a conviction, even though the effects of prejudice cannot be detected or may even seem absent. See *Cassell* v. *Texas*, 339 U.S. 282 (1950); *Avery* v. *Georgia*, 345 U.S. 559 (1953). This right of a defendant not to have members of his race excluded from his jury is a guarantee that neither the substance nor the appearance of racial prejudice will interfere with his right to a fair trial, rather than merely a remedy designed to deal with cases of demonstrable prejudice in a verdict. As Mr. Justice Stewart has said, "it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendants," *Chapman* v. *California*, 386 U.S. 18 (1967) (concurring opinion).

The Fifth Amendment's condemnation of racial discrimination by federal officials, *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), and the statutory mandate that a selective service registrant be selected for service in an "impartial manner" by a system in which "there shall be no discrimination on account of race or color . . ." (50 U.S.C. App. § 455(a)), should provide the same guarantees to the black registrant as does the Fourteenth Amendment to the black criminal

defendant. The identity in both principle and practice of a jury and a local draft board compels the conclusion that the black selective service registrant be granted the same right long accorded to the black defendant—the right to have his case considered by a body from which members of his race have not been systematically excluded.

The concept of the selective service system which places authority "in the hands of 'civilian neighbors'," Comment, *The Selective Service System,* 76 Yale L.J. 160, 161-165 (1966), and which is "founded upon the grassroots principle, in which boards made up of citizens in each community determine when registrants should be made available for military service," Hershey, *Memorandum from General Hershey,* Sen. Doc. No. 82, 89th Cong. 2d Sess. 4, is almost identical to the common law concept of a jury consisting of the "peers of every Englishman." *Strauder* v. *West Virginia, supra,* 100 U.S. at 308-309. Like a jury, the draft board exercises substantial control over the lives and liberty of its registrants. As one commentator has observed "it is the only government institution outside the criminal court with the power to condemn a man to possible death," Comment, *The Selective Service System, supra* at 160.

In making the decisions that will be of such enormous consequence to its registrants, a draft board must consider facts, credibility of witnesses and matters of public policy. Classification, which is the "key to selection" (32 C.F.R. § 1622.1(b)) is basically a fact finding procedure where wide latitude exists for the exercise of discretion. See *In Pursuit of Equity:—Who Serves When Not All Serve?* Report of the National Advisory Commission on Selective Service, 31, 184 (Table 7.6). In the present case, for example, the draft boards were required to decide whether petitioner was entitled to conscientious objector status on

the basis of whether he conscientiously opposed participation in all wars because of "a belief in a relation to a Supreme Being involving duties superior to those arising from any human relation" (32 C.F.R. § 1622.14) and whether his belief was "sincerely held," *United States* v. *Seeger*, 380 U.S. 163, 185 (1965). As with a jury in a criminal case, it is inevitable that such decisions by draft boards will be "influenced by imponderables—unconscious or conscious prejudices and preferences—and a thousand things we cannot detect and whose influence we cannot weigh," *Cassell* v. *Texas*, 339 U.S. 282, 301-02 (1959) (Clark, J., concurring). A draft board is, moreover, even more vulnerable than a jury to such influences because its wide discretion is unchecked by rules of evidence or the procedural safeguards of a criminal trial. . . .

Finally, the consideration of a registrant's case on appeal where review is limited to the documentary record before the local board (32 C.F.R. § 1626.24) cannot cure deficiencies in the local board hearing, see *United States* v. *Peebles*, 220 F.2d 114, 120 (7th Cir. 1955); and, as the court below recognized, judicial review of local boards is the "narrowest known to the law" (397 F.2d at 915; App. p. 56a). Their decisions, so long as made in conformity with the regulations, are "final even though they may be erroneous." *Estep* v. *United States*, 327 U.S. 114, 122 (1946). Thus, the decisions of local boards enjoy much the same insularity from review as do the verdicts of juries.

The "apprehended existence of prejudice" against black registrants by draft boards from which Negroes have been systematically excluded is just as great, therefore, as that by similarly selected juries against black defendants. Where long-standing notions of segregation and white supremacy have resulted in the exclusion of all Negroes from local boards, it would be ingenuous to suppose that the same

attitudes do not in turn influence the discretionary function of those very boards. Rather, as Mr. Justice Douglas has observed "the presence of an all-white Board in a racially prejudiced community may well result in blacks carrying more than their fair share of the Vietnam burden," *Sellers* v. *Laird*, 395 U.S. 950, 954 (1969) (dissenting opinion).

This Court need not look far to find examples of cases where such all-white draft boards may have been motivated by racial prejudice in their actions. In *DuVernay* v. *United States*, 394 F.2d 979, *aff'd by an equally divided court*, 394 U.S. 309 (1969), the black petitioner claimed that the chairman of the local board which had refused to reopen his classification in the exercise of its discretion under 32 C.F.R. § 1625.2 had organizational ties with the Ku Klux Klan; in *Sellers* v. *McNamara*, 398 F.2d 893 (5th Cir. 1968), *cert. denied, sub nom. Sellers* v. *Laird*, 395 U.S. 950 (1969), the petitioner's file contained statements identifying him as a civil rights activist and a "semi-professional race agitator"[8]; in *Sumrall* v. *United States*, 397 F.2d 924 (5th Cir. 1968), *cert. denied*, 393 U.S. 991 (1968), the record established that a local draft board official had been instrumental in obtaining the dismissal of certain criminal charges that were pending against petitioner, a civil rights activist, for the admitted purpose of ridding the community of him (397 F.2d at 927); and in *United States* v. *Cabbage*, —— F.2d ——, 7 CrL 2439 (6th Cir. July 31, 1970), the registrant's

[8] In *Sellers* v. *United States*, 396 U.S. 9 (1969), this Court vacated this same petitioner's criminal conviction for failure to submit to induction and remanded his case for further proceedings when the United States admitted that the FBI had monitored certain of his conversations by means of electronic surveillance, subsequently held to be illegal, *United States* v. *Sellers*, —— F. Supp. ——, 7 CrL 2327 (N.D. Ga. June 16, 1970).

file contained a secret FBI report identifying him as an active black power organizer under FBI scrutiny.[9]

Indeed, one need look no further than petitioner's own case to see how racial prejudice, conscious or unconscious, may have influenced his classification and thus his conviction. Petitioner's claim for conscientious objector status was based upon the teachings of the Lost Found Nation of Islam, an unorthodox religion which is widely misunderstood, feared and hated by white people throughout the country, but particularly in the South.[10] Especially in light

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[9] In view of the court's reversal of the registrant's conviction for refusal to submit to induction on the ground that the existence of the secret FBI report denied him due process of law, the court found it unnecessary to decide whether the defendant could challenge his induction order on the ground that his draft board lacked jurisdiction. The defendant had argued that the violation of 32 C.F.R. §1604.52(c), which requires all of the members of the local board to be residents of the area in which the board has jurisdiction, rendered the induction order void. But the court did say:

> "We find it intolerable . . . to send appellant back for reclassification by a board which the United States has stipulated to be improperly constituted under the Selective Service regulation without any practical remedy for such violation. The principle of administration of the Selective Service System by potential draftees' 'friends and neighbors' is deeply buried in the history of the Selective Service Act. Allegations of violations of the regulation in the constitution of Selective Service Boards are frequent and usually tied to suggestions that such violations are racially motivated . . ." (7 CrL at 2439.)

See also *United States* v. *Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969); *United States* v. *DeMarco*, 2 SSLR 3204 (N.D. Cal. 1969). *Contra*, *United States* v. *Brooks*, 415 F.2d 502 (6th Cir. 1969); *Czepil* v. *Hershey*, 425 F.2d 251 (7th Cir. 1970); *United States* v. *Nussbaum*, 306 F. Supp. 66 (N.D. Cal. 1969).

[10] See *e.g. Wallace* v. *Brewer*, —— F. Supp. ——, 39 U.S. Law Week 2002 (M.D. Ala. 6/9/70) declaring unconstitutional Alabama's criminal anarchy statute which required Muslims and members of Muslim organizations to register with the State, and enjoining the arrest and prosecution of Muslims under the statute. The court also declared the Alabama legislature's joint resolution establishing a legislative committee to investigate and interrogate persons who may be involved in "unlawful" activities directed against the State's sovereignty unconstitutional and enjoined its application to the Muslims.

of the Department of Justice's characterization of the religion as primarily "political and racial" in its recommendation that petitioner be denied conscientious objector status, it is easy to see how an all-white draft board may have been swayed by racial bias in the denial of petitioner's exemption.[11]

The likelihood that "unconscious or conscious prejudices and preferences" of draft boards may affect black registrants is even greater in some ways than the likelihood that those of juries will affect black defendants. Because of the nature of the selective service system, discrimination in one registrant's case may well affect other registrants adversely. Thus, discrimination in favor of whites in granting deferments, for example, would adversely affect all black registrants, causing them to be reached for induction sooner than they would be otherwise. This discrimination will rarely, if ever, be exposed since appeals will not be taken by the favored registrants. See Comment, *Systematic Exclusion of Negroes from Selective Service Boards; Some Proposal For Reform*, 67 Mich. L. Rev. 756, 784, n. 117 (1969). Such a possibility is quite real, for as three Justices of this Court recently observed "it is common talk that in some areas where all-white draft boards sit, the white registrants do not even ask for deferments in order to obtain them," *Sellers* v. *Laird*, *supra*, 395 U.S. at 954.

The constitutional injury caused by draft boards from which Negroes have been excluded is not limited to the black selective service registrant. For it is undeniable that bitterness and loss of faith in the system is engendered in the entire black community by the conscription

[11] The local board was, moreover, subjected to a barrage of letters, newspaper articles and public statements, many of which reflected racial and religious prejudice against petitioner. (See App. p. 75a, note 23). Most denounced any action by the board which might exempt petitioner from the draft.

of so many of its young men in a process from which it is denied any participation. As the Court of Appeals in this case recognized:

> "The Selective Service System must not only be fair, it must likewise have the appearance of fairness. Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process." (397 F.2d at 911; App. p. 44a)

And as General Hershey himself has said: "The people of this country will support a compulsory system only to the extent that they have confidence in its fairness." Hershey, *supra* at p. 4. In this vital and sensitive area, in order "to perform its high function in the best way 'justice must satisfy the appearance of justice'." *In re Murchison*, 349 U.S. 133, 136-37 (1955).

The same constitutional rule, therefore, that has been applied for almost a century where Negroes have been excluded from jury service should be followed here. Petitioner must be guaranteed that neither the substance nor the appearance of racial prejudice will affect his treatment by the selective service system.

In contending that he has a right to have his draft status determined by draft boards from which members of his race have not been systematically excluded, petitioner is not, as the Court of Appeals erroneously characterized it, invoking a right to "racially proportionate selective service boards." (397 F.2d at 912; App. p. 46a) This distinction is crucial, and this Court's language in *Hernandez* v. *Texas*, 347 U.S. 475, 482 (1954) is equally applicable here:

> "To say that this . . . revives the rejected contention that the Fourteenth Amendment requires proportional rep-

resentation of all the component ethnic groups of the community on every jury ignores the facts. The petitioner did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced. His only claim is the right to be indicted or tried by juries from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution." (Footnotes omitted.)

Neither is the Court of Appeal's analogy of a draft board from which Negroes have been systematically excluded to a malapportioned legislature which has *de facto* authority a persuasive basis for defeating the right petitioner asserts. The potential for the unconstitutional deprivation of the life or liberty of individuals which exists in the case of draft boards is not present in the enactments of malapportioned legislatures. Moreover, like juries and unlike legislatures, draft boards act on individual cases, they apply the law to the particular facts, they act in secrecy and they possess enormous discretion, the discriminatory exercise of which in particular cases remains invisible and therefore totally immune from even minimal judicial control. Indeed, in view of the similarity of draft boards and juries, it would make as much sense to hold that juries from which Negroes have been excluded have *de facto* authority, and that their guilty verdicts cannot be challenged by black defendants. Finally, the threat of disruption and a legal vacuum that would result from the invalidation of all of the acts of a legislature, which has led to the creation of the *de facto* doctrine, *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964), is not present in the case of draft boards. The illegal composition of draft boards can be

remedied almost immediately by the appointment of Negroes to draft boards by the President upon nomination by the Governors of the states,[12] and this Court can minimize any disruption in the selective service system or the armed forces by applying its ruling prospectively only. See *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965); *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966).

In *Sellers* v. *McNamara*, 398 F.2d 893 (5th Cir. 1968) *cert. denied sub nom. Sellers* v. *Laird*, 395 U.S. 950 (1969), the Court of Appeals held that its decision in petitioner's case also precluded a black registrant from seeking, by a direct attack on the jurisdiction of a draft board from which Negroes had been systematically excluded, to enjoin his induction. Thus, the court below has completely deprived the only persons with a direct and immediate stake in the integrity of the operations of the selective service system of any remedy for the serious and continuing violation of their constitutional rights.

This Court should grant review and reverse the decision of the Court of Appeals that withholds from petitioner and from countless other black selective service registrants the enjoyment of so fundamental a right. It should extend the constitutional guarantee of racial equality to an institution that, more than any other, should reflect our national ideals and goals because its only purpose is to preserve and defend them.

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[12] Under 50 U.S.C. App. §460 and 32 C.F.R. §1604.52 local draft boards are to be composed of three *or more* members nominated by the Governor and appointed by the President. Thus, additional Negro members can in every case simply be added to draft boards.

IV.

Petitioner's Conviction Should Be Vacated in Light of *Welsh* v. *United States*, 398 U. S. 333 (1970), Because the Denial of His Conscientious Objector Claim May Have Been Based on a Finding That His Objections to Participation in War Were "Political and Racial" Rather Than "Religious".

The first opinion of the court below outlines the history of the rejection of petitioner's conscientious objector claim (397 F.2d at 905-08, 918-21; App. pp. 31a-34a; 61a-66a). Following tentative rejection of petitioner's claim by the Kentucky Board of Appeals on May 6, 1966, the Department of Justice requested an F.B.I. investigation and a special hearing on the character and good faith of petitioner's objections to participation in war. At the conclusion of the hearing held August 23, 1966:

> " . . . The hearing officer reported to the Department of Justice that the registrant stated his views in a convincing manner, answered all questions forthrightly, that he was impressed by the statements, believed the registrant was of good character, morals and integrity and sincere in his objection on religious grounds to participation in war in any form. He recommended that his conscientious objector claim be sustained . . ." (397 F.2d at 918; App. p. 63a)

However, the Department of Justice opposed petitioner's claim in its advice letter of November 25, 1966, and recommended to the Board of Appeals that it not be sustained. That Board subsequently reaffirmed petitioner's 1-A classification, without providing any grounds for its decision or, indeed, any opinion whatsoever. The court below, in its first decision, found a "basis in fact" for rejection of peti-

tioner's conscientious objector claim. In its second decision it declined to reconsider this issue except to note that in its view the correctness of its previous decision was unaffected by this Court's decision in *Welsh* v. *United States*, 398 U. S. 333 (1970).

It is petitioner's contention that since the denial of his conscientious objector claim may have been based upon the Justice Department's finding that his objections to participation in war were "political and racial" rather than "religious," the *Welsh* case mandates the reversal of his conviction.

In recommending the rejection of petitioner's claim the Department of Justice made a point of finding that petitioner's objections to participation in war "insofar as they are based on the teachings of the Nation of Islam rest on grounds which are primarily political and racial." (397 F.2d at 919; App. p. 64a) There is no way to determine how much this finding influenced the Justice Department and the Appeal Board in their rejection of petitioner's conscientious objector claim. But, at a time when, under the law applicable prior to *Welsh*, a finding that a registrant's belief was not derived from "religious training and belief" was a sufficient reason for the denial of a conscientious objector claim, it cannot be doubted that the Justice Department's characterization of petitioner's objections to war as "political and racial" played a substantial role in the denial of his claim. This conclusion is reinforced by the Department's citation of *United States* v. *Kauten*, 133 F.2d 703 (2d Cir. 1943), in support of its recommendation. In *Kauten*, the court upheld the rejection of conscientious objector status although one of the grounds for rejection was the finding by the Hearing Officer, upheld and adopted by the Appeal Board and the court, that although the registrant "may be sincere in his

opposition to war, his belief does not emanate from any 'religious training and belief' but from his philosophical and political convictions." 133 F.2d at 707, n. 2. Moreover, in concluding that there was a "basis in fact" for the rejection of petitioner's claim, the court below obviously considered the non-religious source of petitioner's beliefs to have been significant, for it quoted at length from what it termed a "penetrating analysis of the beliefs of the Black Muslims," which emphasized the allegedly anti-white, anti-christian and segregationist philosophy of the Muslims. (397 F.2d at 919, n. 16; App. pp. 64a-65a)

Welsh now makes it clear that conscientious objector status cannot be denied on such grounds. Under *Welsh*, it is the strength of a registrant's opposition to war as a matter of conscience—whether his beliefs "function as a religion in . . . [his] life" (398 U.S. at 339)—rather than the source of his beliefs, that is dispositive of his conscientious objector claim. That political beliefs may satisfy the statutory definition follows from this Court's statement that:

> "We certainly do not think that § 6(j)'s exclusion of those persons with 'essentially political, sociological, or philosophical views or a merely personal moral code' should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy." (398 U.S. at 342.)

Indeed, in *Welsh* the registrant characterized his conscientious opposition to war as having been formed "by reading in the fields of history and sociology," and this Court acknowledged that it was "undeniably based in part on his perception of world politics," 398 U.S. at 341, 342.

Although the Justice Department's advice letter included other findings upon which the Appeal Board's re-

jection of petitioner's conscientious objector claim might conceivably have rested, these findings find little support in the record and can provide no legitimate basis for the denial. Indeed, their lack of substance indicates that the "political and racial" source of petitioner's objections to war was perhaps the major factor in the Department's conclusion that he did not qualify for conscientious objector status.

Thus, the advice letter claimed that petitioner's objections to participation in war insofar as they were based on the teachings of the Nation of Islam "constitute objections to certain types of war in certain circumstances, rather than a general scruple against participation in war in any form." (397 F.2d at 919; App. p. 64a). But there is virtually nothing in the record to support a finding that petitioner would have been willing to engage in anything but a theocratic war. The Justice Department relied on the fact that petitioner had said:

> "If the Honorable Elijah Muhammad looked me in my face and he who I believe is directly from Allah, Almighty God, Allah, and if he looked at me and advised me, which I'm sure he wouldn't, to fight in any kind of war, if he advised me to I would." (397 F.2d at 920 n. 18; App. p. 66a)

But in *Sicurella* v. *United States*, 348 U.S. 385 (1955), this Court held that willingness to fight in a theocratic war, or a war conducted under the direction of one's god, was not inconsistent with conscientious objector status.[13] And the

[13] In *Sicurella* this Court said:

"Granting that these articles picture Jehovah's Witnesses as antipacifists, extolling the ancient wars of the Israelites and ready to engage in a 'theocratic war' if Jehovah so commands them, and granting that the Jehovah's Witnesses will fight at Armageddon, we do not feel this is enough. The test is

lower federal courts have consistently held that willingness to use force in defense of self, home and co-religionists, and to fight in a war when so commanded by one's god, was not inconsistent with the required opposition to participation in war in any form. See, *e.g., United States* v. *Hartman,* 209 F.2d 366 (2nd Cir. 1954); *United States* v. *Carroll,* 398 F.2d 651, 655 (3rd Cir. 1968); *Kessler* v. *United States,* 406 F.2d 151 (5th Cir. 1969); *Taffs* v. *United States,* 208 F.2d 329 (8th Cir. 1953), *cert. denied,* 347 U.S. 928 (1954); *Hinkle* v. *United States,* 216 F. 2d 8 (9th Cir. 1954), *cert. denied,* 348 U.S. 970 (1955); *Ashauer* v. *United States,* 217 F.2d 788 (9th Cir. 1954); *Kretchet* v. *United States,* 284 F.2d 561 (9th Cir. 1960); *Annett* v. *United States,* 205 F.2d 689 (10th Cir. 1953). Here, as in *Hartman, supra,* there is nothing in the record to show that petitioner could conscientiously participate in any flesh-and-blood war.

The Justice Department also noted passages from a Black Muslim newspaper and from a book indicating that it was the view of the Muslims that blacks should dissociate themselves from the policies of the United States; and quoted petitioner as stating Muslims were not to participate in wars on the side of "nonbelievers." But, again, there is no support for a finding that petitioner could conscientiously participate in any conceivable earthly war. Indeed, in the supplemental memorandum filed in this Court

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not whether the registrant is opposed to all war, but whether he is opposed on religious grounds, to participation in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not seem to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, * * * [w]e believe that Congress had in mind real shooting wars. . . . We believe the reasoning of the Government . . . is so far removed from any possible congressional intent that it is erroneous as a matter of law." (348 U.S. at 390-91)

when the case was here previously on petition for certiorari, the Solicitor General acknowledged that the testimony at the hearing on petitioner's claim of exemption to the effect that male members of petitioner's religion were trained only in self-defense, with "no thought of actually engaging in any type of war," was never questioned. (Supplemental Memorandum for the United States, p. 4, n. 3) The Justice Department advice letter concluded that petitioner's conscientious objections were based in part upon his "expressed objection to participation in the Vietnam War." But this was supported only by quotations from petitioner to the effect that he had "no personal quarrel with the Vietcong." (397 F.2d at 920, n. 18; App. p. 67a) A lack of sympathy with the war in Vietnam is of course consistent, rather than inconsistent, with conscientious objection to all armed conflict, as the Fifth Circuit itself noted in *Kessler* v. *United States*, 406 F.2d 151, 155 (5th Cir. 1969.).[14]

A final aspect of the Justice Department advice letter upon which the Appeal Board might have relied is the implication that petitioner may not have been sincere in his conscientious objector claim. But again there is little in the record to support such a finding. As noted, *supra*, p. 47, the Hearing Officer concluded that petitioner was "sincere in his objection on religious grounds to participation in war in any form." At petitioner's sentencing the United States Attorney stated that:

> " . . . This tragedy and the sadness of having lost his title and having been convicted of a felony I think is

[14] Even assuming that there was a basis in fact for a finding that petitioner was opposed only to participation in certain wars, and that the Appeal Board relied on this ground, the instant case would be governed by this Court's disposition of the issues raised in *Negre* v. *Larsen*, 418 F.2d 908 (9th Cir. 1969), *cert. granted*, 399 U.S. 925, O.T. 1970 No. 1669 Misc., and *United States* v. *Gillette*, 420 F.2d 298 (2d Cir. 1970), *cert. granted*, 399 U.S. 925, O.T. 1970 No. 1170.

> because of his coming under the influence of the Muslim faith in the United States, which is just as much political as it is religious. I believe he is sincere in his beliefs." (Trial Transcript p. 355)

And even the Solicitor General conceded that the resumé of the F.B.I. investigation of petitioner's neighbors, friends, business associates and relatives, revealed virtually no evidence of petitioner's insincerity. (Supplemental Memorandum for the United States, p. 3)

Petitioner submits that there was no basis in fact for any of the grounds advanced by the Justice Department for rejecting petitioner's claim and his conviction should be reversed for this reason. But, even assuming that there was sufficient evidence to support some legitimate ground for rejecting petitioner's claim, the Appeal Board's decision may have been based on the "political and racial" source of petitioner's objections to participation in war which, in light of *Welsh*, is an erroneous ground as a matter of law. Especially in view of the weakness of the Justice Department's other findings, it is likely that this in fact played a substantial part in the Board's decision.

Since the Appeal Board's decision may have rested on this or some other improper ground, petitioner's conviction cannot be sustained. As this Court held in *Sicurella* v. *United States*, 348 U.S. 385 (1955), where the Department of Justice had erroneously recommended that a registrant be denied an exemption:

> " . . . we feel that this error of law by the Department, to which the Appeal Board might naturally look for guidance on such questions, must vitiate the entire proceedings at least where it is not clear that the Board relied on some legitimate ground. Here, where it is impossible to determine on exactly which grounds the

Appeal Board decided, the integrity of the Selective Service System demands at least that the Government not recommend illegal grounds." (348 U.S. at 392)

This rule has been widely followed,[15] and it has been specifically held that where the record does not indicate which of several grounds present in a Justice Department advice letter the Appeal Board relied on in denying a conscientious objector exemption, and where one of those grounds is erroneous as a matter of law, a conviction for failure to submit to induction must be reversed.[16] Consequently, petitioner's conviction should be reversed and the indictment dismissed in the interest of justice. See *United States* v. *Jakobson*, 325 F.2d 409, 417 (2nd Cir. 1963), *aff'd sub nom. United States* v. *Seeger*, 380 U.S. 183 (1965). Alternatively, since rejection of petitioner's claim may have rested on the ground that he was opposed only to certain wars, this Court should retain jurisdiction until it decides the issues raised in *Negre* v. *Larsen* and *United States* v. *Gillette*, *supra* n. 14.

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[15] See, *e.g.*, *United States* v. *Jakobson*, 325 F.2d 409 (2d Cir. 1963), *aff'd sub nom. United States* v. *Seeger*, 380 U.S. 183 (1965); *United States* v. *Broyles*, 423 F.2d 1299 (4th Cir. 1970) (*in banc*); *Ypparila* v. *United States*, 219 F.2d 465 (10th Cir. 1954); *Kretchet* v. *United States*, 284 F.2d 561 (9th Cir. 1960); *United States* v. *St. Clair*, 293 F. Supp. 337 (E.D. N.Y. 1968).

[16] See, *e.g.*, *Jakobson* and *Kretchet*, *supra* n. 15. In *Kretchet* the court said:

"We are unable to determine from the record whether the board, in refusing appellant's claim for exemption, did so because of appellant's lack of sincerity or because it believed that appellant's conscientious objections were not based upon religious training and belief, or because appellant was not opposed to war in any form, or whether such action was based upon all three grounds or on any two of them. The advice given by the Department of Justice to the appeal board that it could refuse to sustain appellant's claim for exemption on the ground that he was not opposed to war in any form, in our view, was clearly erroneous and fatally infected the adverse recommendation of the Department of Justice." (284 F.2d at 565)

V.

Petitioner's Conviction Must Be Reversed Because There Was No Basis in Fact for Denying Him a Ministerial Exemption on the Ground That He Was Also a Professional Boxer.

Petitioner was certified as a minister and alleged that he spent 90% of his time on his ministerial duties. He submitted 43 affidavits and documents containing the signatures of 3,612 people testifying to his ministerial activities. (397 F.2d at 917; App. p. 60a) The Court of Appeals found a basis in fact for rejection of his ministerial exemption claim in the fact that he had continually listed his occupation or livelihood as a professional boxer, concluding that "[H]is vocation is clearly that of a professional boxer." (397 F.2d at 918; App. p. 61a) The court made no finding, however, that petitioner did not "regularly, as a vocation, teach and preach the principles of his religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect or organization." 50 U.S.C. App. §466(g)(3) The court's apparent assumption that the mere fact that petitioner had a boxing career disqualified him from ministerial status is in violation of the long-accepted principle that a person can qualify as a minister if he satisfies objective requirements that he teach and preach regularly and act as a leader of his faith, even though he may, at the same time, practice another vocation. As noted in *United States* v. *Singleton*, 282 F. Supp. 762, 765 (S.D. N.Y. 1968):

> "... The test for a ministerial exemption is whether regularly, as a vocation, the registrant teaches and preaches the principles of his sect and conducts public worship in the tradition of his religion. Dickinson v. United States, 346 U.S. 389, 74 S.Ct. 152, 98 L.Ed. 132

(1953); 50 U.S.C. App. § 466(g). The fact that defendant may be otherwise employed fulltime, as in the case of many Jehovah's Witnesses' ministers who are not paid, is not conclusive of the issue."

See also, *e.g.*, *United States* v. *Jackson*, 369 F.2d 936 (4th Cir. 1966); *United States* v. *Stewart*, 322 F.2d 592 (4th Cir. 1963); *Wiggins* v. *United States*, 261 F.2d 113 (5th Cir. 1958). A rule such as that applied by the Court of Appeals works to the prejudice of a religion such as the Lost Found Nation of Islam, which relies on unpaid lay ministers, who of necessity must engage in some form of secular employment."

CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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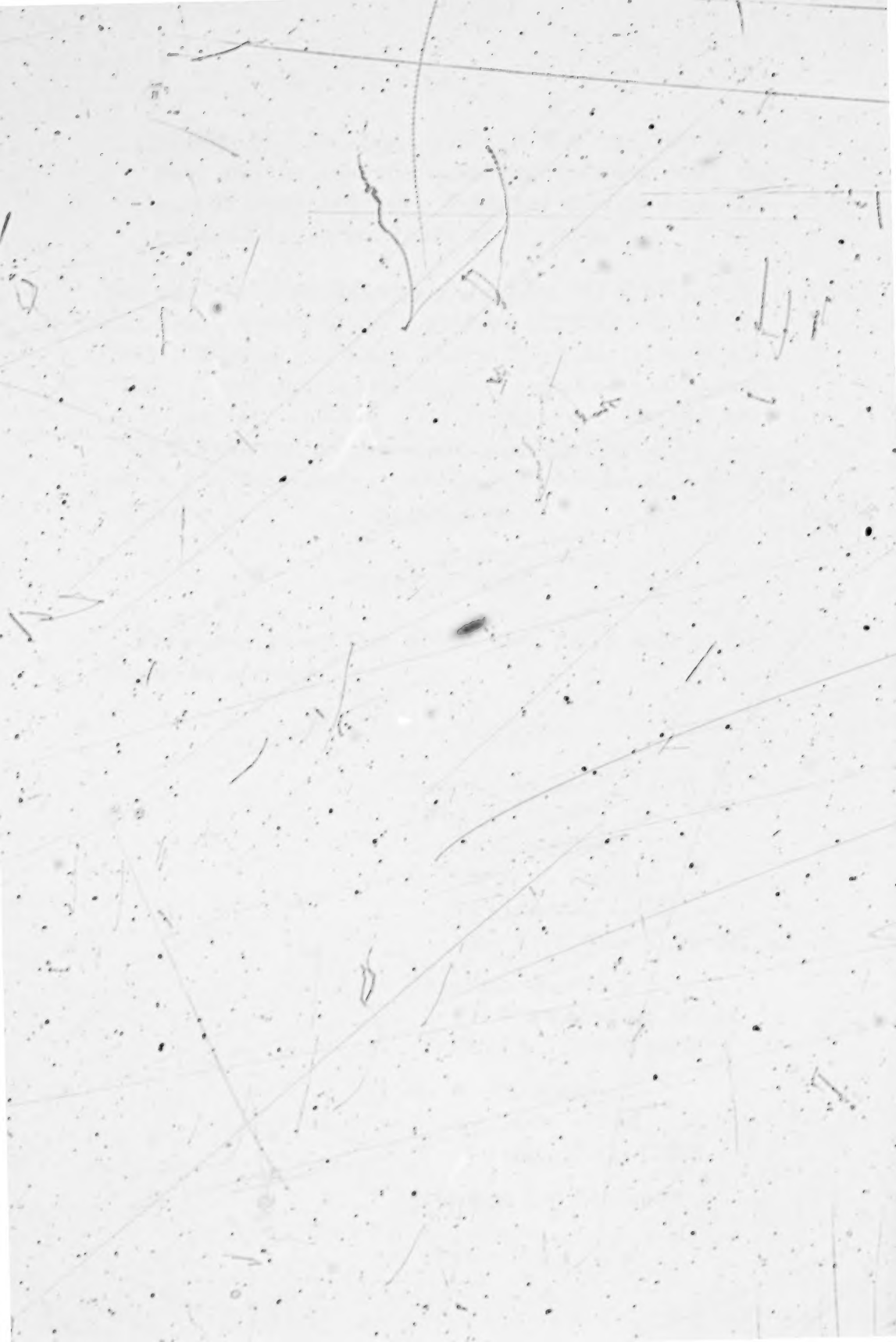
APPENDIX



Opinion of the Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28252

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CASSIUS MARSELLUS CLAY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(July 6, 1970)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

AINSWORTH, Circuit Judge: This Selective Service case involves the conviction by a jury on June 20, 1967 of Cassius Marsellus Clay, Jr., also known as Muhammad Ali, former professional heavyweight boxing champion of the world, for wilfully refusing to be inducted into the Armed Forces of the United States, in violation of 50 U.S.C. App. § 462, and is

before us for the second time.[1] We affirmed the conviction on May 6, 1968, and rehearing en banc was denied June 6, 1968. See *Clay v. United States*, 5 Cir., 1968, 397 F. 2d 901.

The defendant then petitioned the Supreme Court for certiorari, and while the petition was pending before that Court, the Government revealed that there had been five telephone conversations participated in by defendant which were overheard by the Federal Bureau of Investigation by electronic wiretapping. Accordingly, the Supreme Court granted certiorari, *sub nom. Giordano v. United States*, 394 U. S. 310, 89 S. Ct. 1163 (1969), and remanded this case to the District Court for further proceedings in conformity with *Alderman v. United States*, 394 U. S. 165, 89 S. Ct. 961 (1969), to determine whether the conviction was affected by the wiretaps.

Pursuant to the Supreme Court's grant of certiorari, a lengthy hearing was then held before District Judge Joe Ingraham on June 2, 4, 5, and 6, 1969, in Houston, Texas, at which time the Court considered the FBI logs of the five wiretapped telephone conversations delivered to it in advance of the hearing by the Government. The Court then ordered that the logs of wiretapped conversations 1, 2, 3, and 4 be received in evidence and their contents fully disclosed to the defendant. As to these four logs of wiretapped telephone conversations, the Court held that the defendant had standing to assert the illegality of the surveillance and that

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[1] Defendant's request that this case, now on its second time before the Court, be heard en banc was denied on February 10, 1970.

the illegality was not challenged by the Government. The fifth log of a wiretapped conversation in which defendant participated was considered in camera by the District Judge, with related exhibits, and held to be a lawful surveillance by the FBI pursuant to the Attorney General's authorization of a wiretap for the purpose of gathering foreign intelligence.

The District Court concluded that the first four logs did not bear on the issues involved in defendant's conviction; that the defendant failed to show any relevancy of these logs to the conviction; and that the conviction must stand. The fifth wiretapped conversation which related to the gathering of foreign intelligence was held to be lawful surveillance, reasonable and necessary to the protection of the national interest.

As we have stated, logs 1, 2, 3, and 4 were made available to defendant to afford him an opportunity to show the relevance of any of these wiretapped conversations to his Selective Service law conviction. (The logs are all of the evidence which the FBI possesses of the wiretapped conversations, the tapes on which the conversations were originally recorded having been erased when the logs were typed.) The five telephone conversations were not tapped in an electronic surveillance of defendant Clay but were made in connection with surveillance of others, the defendant not having been the subject of the surveillance.

Log 1 pertained to a telephone conversation on April 22, 1965, when the telephone of Elijah Muhammad was tapped in Phoenix, Arizona. A person named Herbert called the defendant, Clay, asking him about his physi-

cal condition, prospective fights, and personal details relative to the family.[2]

Log 2 referred to another wiretap of a telephone conversation of the telephone of Elijah Muhammad on March 24, 1964. Elijah called defendant Clay, telling him that he wanted to see him about making a minister out of him when "he quit thinking of fighting all the time" and that Clay would make a better minister than a fighter.[3]

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[2]Log 1 is reproduced in full as follows:

"Herbert called, via operator, to 305-635-8893 in Miami and asked to speak to Cassius Clay. Herbert told Clay he was here in Arizona and asked how Clay was. Clay said he was fine and was down to 213 pounds. Herbert told him not to overdo it. Herbert asked him if he was going to Boston soon and he said yes, about a week and a half. Herbert said he would be down there to see him fight with his brother. Clay told him to call two days before. Clay mentioned that one boy backed out. He asked Herbert how long he was going to be out here and Herbert said he might leave tomorrow. Herbert asked how everything else was and Clay said fine. Herbert asked how his brothers were and Clay mentioned that James got put out of the temple for being out all night with women. Herbert said Clay knew what to do with a case like that, to get him a ticket and send him back where he came from. Herbert asked about . . . (probably his wife) and Clay said she had gone to Jackson with a lady friend. Herbert said he would probably call him tomorrow, to take it easy and if there was anything he could do to let him know. Clay mentioned something about having Herbert check his car when he, Herbert, got to Chicago. /Recorded/."

[3]Log 2 is reproduced in full as follows:

"Elijah took call from C. Clay. Elijah asked the time there and then said it was only 1 hr. faster than here. Elijah said he wanted to see Clay as he was

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Log 3 was another log of a wiretap of the Phoenix, Arizona, telephone of Elijah Muhammad of a telephone conversation on October 22, 1964, when a man believed to be John Ali talked to a person believed to be the defendant, Clay, giving him a message from Elijah about holding up "those TV people," who were apparently about to interview Clay.[4]

Log 4 was taken on September 4, 1964, in Atlanta, in connection with surveillance of the telephone of Dr. Martin Luther King, Jr. MLK (ostensibly Dr. King) exchanged greetings with defendant Clay, wished him well on his recent marriage, and in turn was invited to attend defendant's next championship fight. Clay also told MLK to take care of himself, that he is known world wide, and admonished him that he "should watch out for them whities," etc.[5]

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going to make a minister out of him when he quite (sic) thinking of fighting all the time. Elijah said he would make a better minister than a fighter anyhow. Elijah then said he would contact him when he had time to talk to him. Elijah also told him to keep quiet."

[4]Log 3 is reproduced in full as follows:

"Man believed to be John Ali is heard dialing out on Albert's phone for a long distance call via direct dial. He then talks to person believed to be Muhammad Ali (Clay) and says he has just talked with the Messenger and the Messenger would like for him to hold up those TV people a while since they are going to be here Saturday and he will see what they want so that he (Elijah) will know what (Clay) is going to be asked to say. John mentions that he will probably be coming there when he leaves Phoenix and should be there for Saturday and Sunday. He then gives the Muslim closing."

[5]Log 4 is reproduced in full as follows:

"Chauncey to MLK, said he is in Miami with Cassius,

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The Trial Judge held that "the logs are so totally innocuous that they could not have had any bearing on the defendant's conviction under any circumstances." The District Judge's reasons in this regard, ably expressed, with which we agree, are reproduced in pertinent part in the margin.[6]

MLK spoke to Cassius, they exchanged greetings, MLK wished him well on his recent marriage, C invited MLK to be his guest at his next championship fight, MLK said he would like to attend. C said that he is keeping up with MLK that MLK is his brother, and with him 100 — but can't take any chances, and that MLK should take care of himself, that MLK is known world wide and should watch out for them whities, said that people in Nigeria, Egypt and Ghani asked about MLK."

The Trial Judge said:

"Turning to the significance of the logs, the only manner in which the foregoing conversations were argued relevant to the defendant's conviction centered around the rejection of the defendant's conscientious objector claim. This was a plausible argument, for if the recommendation by the Department of Justice to deny the claim was based upon illegally obtained evidence, the 'basis in fact' which this court found for his classification would have been defective. Without such a 'basis of fact', the defendant could effectively challenge the jurisdiction of the draft board which classified him and ordered him to report for induction.

"The specific relevancy sought between the defendant's classification and the overheard conversations involves the statement in the Department of Justice's recommendation that 'registrant's objections to participation in war insofar as they are based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form."' *Clay v. United States*, 397 F. 2d 901 (5 CA 1968). The defendant attempted to show first, that because Log 2 reflects Elijah's wish that Clay become a minister, and because Log 4

reflects Clay's reference to 'them whities' the logs would have a bearing on the Department's conclusion that the defendant's beliefs were political and racial, rather than religious. He secondly attempted to demonstrate how this information was transmitted upward through F.B.I. channels through the Department of Justice and into the recommendation, and back to the draft appeals board.

"As to the second argument, that the information was used by the Department of Justice in making its recommendation, there was positive testimony that the logs were not used at all in the preparation of the report. Only the most strained construction of the cross-examination testimony would support a contrary finding. But the court need not reach this question, for it believes, and so holds, that the logs are so totally innocuous they could not have had any bearing on the defendant's conviction under any circumstances. This is because, first, as regards Log 2, the Department of Justice's duty was to submit a recommendation concerning the defendant's status as a conscientious objector, not a minister. It is obvious that the Department could have, had it believed it was warranted, recommended that the defendant be granted a conscientious objector deferment despite the fact that he was not a minister of his religion. Moreover, even if this issue had been before the Department, it is clear that the evidence that he was not a minister up to at least March 19, 1966, is overwhelming. See discussion in *Clay v. United States*, *supra* at 915-18. Thus examining this log in a light most likely to demonstrate prejudice to the defendant, there is more than enough evidence to dispel possible taint. The conclusion that the defendant should not have been entitled to a ministerial exemption springs clearly from an 'independent origin'. *Nardone v. United States*, 308 U. S. 338 (1939).

"Defendant's attempt to link Log 4 to his conviction must similarly fail. To construe a passing reference to 'them whities' as being the Department's basis, or even partial reason, for holding the defendant's beliefs to be political and racial is completely untenable. The conversation was not a theological discussion. The common slang reference was not within a context

There was likewise no error committed by the District Court in rejecting the broad and sweeping demands for discovery by defendant's counsel of FBI files, documents, wiretapping information and tapes and transcriptions, relating to persons and conversations not participated in by defendant. All of the logs of recorded conversations of defendant were produced for his inspection except the fifth wiretap which pertained to foreign information gathering and which we will discuss later. The defendant had no right to see records or logs of conversations to which he was not a party, nor to rummage in Government files. *Alderman v. United States*, 394 U. S. 165, 185, 89 S. Ct. 961, 973 (1969); *Taglianetti v. United States*, 394 U. S. 316, 317, 89 S. Ct. 1099, 1100 (1969). It is clear from uncontradicted testimony that none of the information

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which could have had any bearing on the defendant's beliefs. A Negro not a member of the Nation of Islam would be as likely to say the same thing. In addition, if it had been in such a context, and it could be construed to be even viciously derogatory, again there was ample evidence from an independent origin before the Department to conclude that the Muslim religion holds the white race in contempt. See *Clay v. United States*, *supra* at 919 n. 16.

"As regards Logs 1 and 3, they are so totally innocuous even defendant's counsel could not point to nay specific language which could bear on the defendant's conviction. The thrust of defendant's argument concerning these logs, as well as Logs 2 and 4 was that there must have been other matters discussed by the parties which were relayed to the Department of Justice. The court does not credit this argument. The testimony was clear that the original tapes were erased immediately after the logs were typed, and that the logs received in evidence were the only ones prepared. The individuals who monitored the conversations in Phoenix testified that they communicated no other information to anyone."

obtained in the five wiretapped telephone conversations was used in the FBI investigation of defendant's conscientious objector claim, or in the preparation of the adverse Department of Justice recommendation made in connection with defendant's original request for conscientious objector classification?[7] In our view the Trial Court exercised "informed discretion, good sense, and fairness," *Alderman, supra*, 394 U. S. at 185, 89 S. Ct. at 973, in denying defendant's discovery demands and we perceive no sound reason for interfering with his decision.[8]

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[7]Defendant was mailed a copy of the adverse recommendation on November 29, 1966. *See* 397 F. 2d at 906.

[8]The District Judge, in his memorandum opinion, said in this regard:

> In Alderman v. United States, supra, the Court said that '(n)one of this means that any petitioner will have an unlimited license to rummage in the files of the Department of Justice. Armed with the specific records of overheard conversations and with the right to cross examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge.' Id. at 185. And in Taglianetti v. United States, 394 U. S. 316 (1969), the Court said that '(n)othing in Alderman v. United States, Ivanov v. United States, or Butenko v. United State, ante, p. 165, requires an adversary proceeding and full disclosure for every issue raised by an electronic surveillance. . . . Here the defendant was entitled to see a transcript of his own conversations and nothing else. He had no right to rummage in government files.' Id. at 317. Despite the foregoing, the defendant's counsel insistently requested what would be, in essence, a full-scale inquiry into F.B.I. practices. The court does not believe that anything was shown which would warrant such an inquiry. Defendant had ample opportunity to demonstrate first, that the logs

The fifth wiretap was not disclosed to defendant because the District Court found that the surveillance was lawful, having been authorized by the Attorney General, for the purpose of obtaining foreign intelligence information. The Supreme Court has not yet decided whether electronic surveillance for the purpose of gathering foreign intelligence information is constitutionally permissible, *Giordano v. United States*, *supra*, 394 U. S. at 314, 89 S. Ct. at 1165, 1166 (1969), though Mr. Justice White has expressed the view that such surveillance does not violate the Fourth Amendment. *See Katz v. United States*, 389 U. S. 347, 364, 88 S. Ct. 507, 517 (1967).

Moreover, in *Giordano*, *supra*, 394 U. S. at 314, 89 S. Ct. at 1165, Mr. Justice Stewart in a concurring opinion stated the following in regard to the mandate of *Alderman*, *supra*, for further hearing and the procedure to be followed in a criminal case where wiretap-

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contained prejudicial material, and second, that the material was communicated to and was used by the Department of Justice in making its recommendation. Had he established the first, perhaps more extensive discovery would have been in order. But the defendant should not be permitted such broad discovery to attempt to prove transmittal of the information if he cannot first show that the information could have been, even in part, relevant to his conviction.

"It might be added that Taglianetti v. United States, supra, intimates that the district court could, in some circumstances, make the determination that wiretap evidence is innocuous in an in camera inspection. This is, the court believes, such a case. Nevertheless, an adequate opportunity was given the defendant to prove relevance in an adversary proceeding. The proceeding was as extensive as Alderman requires. He failed to show the requisite relevancy, and the conviction must stand."

ping information relative to a defendant had been obtained.

> "We have nowhere indicated that this determination cannot appropriately be made in *ex parte, in camera* proceedings. 'Nothing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, 394 U. S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176, requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance.' Taglianetti v. United States, 394 U. S. 316, 89 S. Ct. 1099, 22 L. Ed. 2d 302."

An in camera examination of the fifth log and a description of the premises which were the subject of the surveillance, together with the Attorney General's express authorization to the FBI to make the surveillance, was accordingly made by the Trial Judge. It has also been made by the three judges of this panel. From this examination we agree that the log of the fifth wiretapped telephone conversation (1) was authorized by the Attorney General in writing to the FBI; (2) that it was not made pursuant to a surveillance of defendant but rather of others, and the premises were identified; (3) that it was made in connection with obtaining foreign intelligence information; (4) that the Executive Branch of the Government has properly and reasonably requested that the log not be published or disclosed to the defendant or the public because "it would prejudice the national interest to disclose the particular facts concerning this surveillance other than to the court *in camera*" (see affidavit of

Attorney General Mitchell); and (5) its contents do not in any manner bear upon the issues involved in defendant's draft law violation case, and in no way has this wiretap prejudiced defendant, helped build a case against him, or assisted in bringing about his conviction.

Defendant and amicus contend that the Supreme Court's decision in *Alderman, supra,* requires an adversary hearing and mandates that all wiretapped information of defendant's conversations be furnished to him, including the fifth log pertaining to foreign intelligence gathering; that the District Court erred in failing to disclose the fifth log to him and in not holding a hearing thereon to determine if the wiretap tainted defendant's conviction; that full disclosure is required by the Constitution and the Bill of Rights, and that section 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605, bars any use of wiretap in a criminal prosecution.

Under the circumstances here, publication of the fifth log to defendant is unwarranted and would be contrary to the national interest, having been obtained in foreign intelligence surveillance. The Court's in camera examination of the fifth log establishes to our satisfaction that the contents of the wiretap were not germane to any issue in this criminal prosecution and conviction. There has been no use against defendant of the information gained by the Government by the fifth wiretap and the information there obtained would not have been of assistance to the prosecutor in constructing a case against defendant. There is no indication that

the information was or could be used in any way against defendant.

Determination of this case requires that we balance the rights of the defendant and the national interest. The Attorney General, who acts here for the President and Commander-in-Chief, has submitted his affidavit that the fifth wiretap was maintained "for the purpose of gathering foreign intelligence information" and the Attorney General opposed disclosure at the hearing because "it would prejudice the national interest to disclose particular facts concerning this surveillance other than to the court." The fifth log was submitted by the Government for an in camera examination by the Court, which has been made both here and in the District Court. The rights of defendant and the national interest have thus been properly safeguarded. Further judicial inquiry would be improper and should not occur. It would be "intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U. S. 103, 111, 68 S. Ct. 431, 436 (1948). We, therefore, discern no constitutional prohibition against the fifth wiretap.

Section 605 of Title 47, U.S.C., is a general prohibition against publication or use of communications obtained by wiretapping, but we do not read the section as forbidding the President, or his representative, from ordering wiretap surveillance to obtain foreign intelligence in the national interest. When Congress enacted Title III of the Omnibus Crime Control and Safe Streets

Act of 1968, 18 U.S.C. § 2511(3) thereof, it specifically denied any section 605 limitation, as follows:

> "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measure as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable and shall not be otherwise used or disclosed except as is necessary to implement that power."

This is a clear statement by Congress itself relative to the scope of the section 605 provisions which are not to limit the President's constitutional prerogative to obtain foreign intelligence information.

We reiterate that no use of the fifth log was made in this case against defendant. It played no part in his conviction and our in camera scrutiny thereof thoroughly convinces us that defendant was not prejudiced thereby. As the Supreme Court said in *Taglianetti v. United States*, 394 U. S. 316, 317, 318, 89 S. Ct. 1099, 1101 (1969), "Under the circumstances presented here, we cannot hold that 'the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court.' *Alderman v. United States, supra*, 394 U. S., at 182, 89 S. Ct., at 971." No one would seriously doubt in this time of serious international insecurity and peril that there is an imperative necessity for obtaining foreign intelligence information, and we do not believe such gathering is forbidden by the Constitution or by statutory provision, including 47 U.S.C. § 605.

We are urged to reconsider the issues decided by us in our original decision in this case, 397 F. 2d 901, but we decline to do so.[9] We declined en banc recon-

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[9]We have, however, examined the recent holding of the Supreme Court in Welsh v. United States, ——— U.S. ———, ——— S. Ct. ——— (No. 76, October Term 1969, decided June 15, 1970), to determine if that decision affects the present case. In our view, it does not. The Supreme Court granted Welsh a conscientious objector status because of "deeply and sincerely" held ethical or mortal beliefs which imposed on Welsh "a duty of conscience to refrain from participating in any war at any time." The Court found that Welsh's beliefs functioned "as a religion in his life," thereby entitling him to a "religious" conscientious objector exemption under Section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. § 456(j)), ——— U. S. at ———, ——— S. Ct. at ———. Section 6(j) grants an exemption from service in the Armed Forces to a registrant "who, by reason of religious training and belief,

sideration of our original decision and further refused en banc consideration of this second hearing in this case. Our prior decision is the law of the case on the issues decided there, unless they are affected by the wiretapped telephone conversations.[10] In our view, the defendant's conviction was not so affected and accordingly the judgment of conviction should be

AFFIRMED.[11]

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is conscientiously opposed to participation in *war in any form.*" (Emphasis supplied.) As we pointed out in our original opinion in this case, the Department of Justice recommendation (made in connection with the conscientious objector investigation), to the Kentucky Board of Appeals, stated that Clay's beliefs insofar as they are based upon the teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections *to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form.*" (Emphasis supplied.) *See* 397 F. 2d at 918-919. The Kentucky Board of Appeals thereafter continued the I-A classification of Clay. That there was also a "basis in fact" for the numerous local board, state appeal boards (Kentucky and Texas) and Presidential Appeal Board I-A classifications of Clay, thereby including an adverse determination of the question of Clay's basic sincerity, is amply shown and detailed in our original opinion and in the record to which reference is made. *See* 397 F. 2d at 918-921.

[10] Defendant has cited the Presbyterian Ch. v. Mary E. B. Hull Mem. Pres. Ch., 393 U. S. 440, 89 S. Ct. 601 (1969), in support of its contention that the Department of Justice's analysis that the teachings of the Nation of Islam are primarily political and racial and that this interpretation violates the establishment clause of the First Amendment. We reject this argument for reasons which we have discussed in full in our original opinion in this case relative to Muslim tenets. *See* 397 F. 2d at 918-921.

[11] We have carefully considered all of the additional contentions of defendant, but find them to be without merit, and accordingly they are rejected.

Order Denying Petition for Rehearing and Petition for Rehearing *En Banc*

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28252

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CASSIUS MARSELLUS CLAY, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(August 19, 1970)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it; (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, (
Plaintiff,)

VS. (CR. NO. 67-H-94

CASSIUS MARSELLUS CLAY, JR.,)
a/k/a Muhammad Ali, (
Defendant.)

JULY 14, 1969

Memorandum:

The defendant, Cassius Marsellus Clay, Jr., was convicted by a jury in this court on June 20, 1967, for unlawfully failing to submit to induction into the armed forces of the United States. The conviction was affirmed. Clay v. United States, 397 F.2d 901 (5 CA 1968). The Supreme Court granted certiorari and the case is again before this court on remand from the Supreme Court, Giordano v. United States, 394 U.S. 310 (1969), for further proceedings in conformity with Alderman v. United States, 394 U.S. 165 (1969). It was revealed while the defendant's petition for certiorari was pending that the defendant had been a party to five telephonic conversations which

had been electronically overheard by agents of the Federal Bureau of Investigation. Remand was held necessary, as it was in Alderman, for the district court to determine whether the defendant's conviction was tainted by the information obtained as a result of the electronic [883] surveillance. The Court in Alderman set out the procedure the district court was to follow in making that determination.

Conforming therewith, this court conducted hearings on June 4, 5 and 6, 1969, and, at the Court's request, briefs were filed by counsel. After thoroughly considering the evidence adduced at the hearing, the transcript of those pleadings, and the attorneys' briefs, the court enters this memorandum decision, the following to constitute findings of fact and conclusions of law as ordered in Alderman.

I.

The prosecution delivered to the court, in advance of the hearing, logs of five telephone conversations in which the defendant was one of the conversing parties. It was asserted by the government, and the court credits the assertion as true, that these logs were the only ones found in the F.B.I. files in which the defendant's conversations were overheard. In no instance was the defendant's telephone monitored; it was the other party to the conversation whose telephone was placed under surveillance. It is clear, however, and it is unchallenged by the government, that the defendant has standing to challenge the legality of the surveillance, and to seek suppression of any illegally obtained evidence.

Upon receipt of the logs of the five conversations, the court, at the request of the government, placed four of them (hereinafter referred to as logs 1, 2, 3 and 4) under a protective order. The order provided that the logs would be available to the defendant and his attorneys for inspection, but that they would be prohibited from disclosing the contents to anyone without permission from the court. However, it became apparent that it would be impossible to conduct a public

hearing and explore the relevance of the logs in light of the protective order. The order was therefore dissolved, and the logs were admitted into evidence. The fifth log, which will be discussed later, was not disclosed to the defendant and was not [884] received into evidence, although it was read and considered and will be subject to review upon appeal herefrom.

As was outlined in Giordano v. United States, supra, the court must decide first, whether the defendant "has standing to assert the illegality of the surveillance or of the introduction of its fruits," and second, whether the surveillance was unlawful, for if it was lawful, disclosure and further proceedings would be rendered unnecessary. The first issue has been answered in the affirmative, and the second, the illegality of the surveillance, was never challenged by the government. Since the surveillance was acknowledged to be illegal, the ultimate issue to be decided by the court is "whether the evidence against the (defendant) . . . grew out of his illegally overheard conversation. . . . The question as stated in Wong Sun v. United States, 371 U.S. 471, 488 (1963), is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Alderman v. United States, supra, at 180-81.

The logs of the four conversations admitted into evidence are as follows:

Log 1 (GX-102)

It was shown that this conversation, which took place on April 22, 1965, was overheard via a wiretap placed on the telephone of Elijah Muhammad in Phoenix, Arizona.

> "Herbert called, via operator, to 305-635-8893 in Miami and asked to speak to Cassius Clay. Herbert told Clay he was here in Arizona and asked how Clay was. Clay said he was fine and was down to 213 pounds. Herbert told him not to overdo it. Herbert asked him if he was going to Boston soon and he said

yes, about a week and a half. Herbert said he would be down there to see him fight with his brother. Clay told him to call two days before. Clay mentioned that one boy had backed out. He asked Herbert how long he was going to be out here and Herbert said he might leave tomorrow. Herbert asked how everything else was and Clay said fine. Herbert asked how his brothers were and Clay mentioned that Jaines got put out [885] of the temple for being out all night with women. Herbert said Clay knew what to do with a case like that, to get him a ticket and send him back where he came from. Herbert asked about . . . (probably his wife) and Clay said she had gone to Jackson with a lady friend. Herbert said he would probably call him tomorrow, to take it easy and if there was anything he could do to let him know. Clay mentioned something about having Herbert check his car when he, Herbert, got to Chicago. /Recorded/."

Another summary of the same conversation, marked GX-106, was also admitted. It differs from Log 1 only in minor detail and need not be quoted here.

Log 2 (GX-103)

Taken on March 24, 1964, this was also a result of the Elijah Muhammad wiretap.

"Elijah took call from C. Clay. Elijah asked the time there and then said it was only 1 hr. faster than here. Elijah said he wanted to see Clay as he was going to make a minister out of him when he quite (sic) thinking of fighting all the time. Elijah said he would make a better minister than a fighter anyhow. Elijah then said he would contact him when he had time to talk to him. Elijah also told him to keep quiet."

Another summary of this conversation, marked GX 107 and received in evidence, is almost identical to the foregoing, and need not be quoted here.

Log 3 (GX-104)

Another log from the Phoenix wiretap on the telephone of Elijah Muhammad, taken on October 22, 1964:

> "Man believed to be John Ali is heard dialing out on Albert's phone for a long-distance call via direct dial. He then talks to person believed to be Muhammad Ali. (Clay) and says he has just talked with the Messenger and the Messenger would like for him to hold up those TV people a while since they are going to be here Saturday, and he will see what they want so that he (Elijah) will know what he (Clay) is going to be asked to say. John mentions that he will probably be coming there when he leaves Phoenix and should be there for Saturday and Sunday. He then gives the Muslim closing."

Log 4 (GX-105)

This log was taken on September 4, 1964, in Atlanta, Georgia. The telephone under surveillance belonged to Dr. Martin [886] Luther King, Jr.

> "Chauncey to MLK, said he is in Miami with Cassius. MLK spoke to Cassius, they exchanged greetings, MLK wished him well on his recent marriage, C invited MLK to be his guest at his next championship fight, MLK said he would like to attend; C said that he is keeping up with MLK, that MLK is his brother, and with him 100% but can't take any chances, and that MLK should take care of himself, that MLK is known world wide and should watch out for them whities; said that people in Nigeria, Egypt and Ghani asked about MLK."

Because the defendant suggested that this log did not contain all of the conversation with Dr. King that he was entitled to receive, the government submitted to the court for an in camera examination the original log from which Log 4 was prepared. The court has read it, and concludes that the defendant's assertion is without merit. If there was any further conversation

between Dr. King and the defendant, it was not recorded in the log; the defendant is not entitled to see a log of a conversation to which he was not a party.

Turning to the significance of the logs, the only manner in which the foregoing conversations were argued relevant to the defendant's conviction centered around the rejection of the defendant's conscientious objector claim. This was a plausible argument, for if the recommendation by the Department of Justice to deny the claim was based upon illegally obtained evidence; the "basis in fact" which this court found for his classification would have been defective. Without such a "basis in fact," the defendant could effectively challenge the jurisdiction of the draft board which classified him and ordered him to report for induction.

The specific relevancy sought between the defendant's classification and the overheard conversations involves the statement in the Department of Justice's recommendation that "registrant's objections to participation in war insofar as they are based upon the teachings of the Nation of Islam 'rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple [887] against participation in war in any form.'" Clay v. United States, 397 F.2d 901 (5 CA 1968). The defendant attempted to show first, that because Log 2 reflects Elijah's wish that Clay become a minister, and because Log 4 reflects Clay's reference to "them whities," the logs would have a bearing on the Department's conclusion that the defendant's beliefs were political and racial, rather than religious. He secondly attempted to demonstrate how this information was transmitted upward through F.B.I. channels, through the Department of Justice and into the recommendation, and back to the draft appeals board.

As to the second argument, that the information was used by the Department of Justice in making its recommendation, there was positive testimony that the logs were not used at all in the

preparation of the report. Only the most strained construction of the cross-examination testimony would support a contrary finding. But the court need not reach this question, for it believes, and so holds, that the logs are so totally innocuous they could not have had any bearing on the defendant's conviction under any circumstances. This is because, first, as regards Log 2, the Department of Justice's duty was to submit a recommendation concerning the defendant's status as a conscientious objector, not a minister. It is obvious that the Department could have, had it believed it was warranted, recommended that the defendant be granted a conscientious objector deferment despite the fact that he was not a minister of his religion. Moreover, even if this issue had been before the Department, it is clear that the evidence that he was not a minister up to at least March 19, 1966, is overwhelming. See discussion in Clay v. United States, supra, at 915-18. Thus, examining this log in a light most likely to demonstrate prejudice to the defendant, there is more than enough evidence to dispel possible taint. The conclusion that the defendant should not have been entitled to a ministerial exemption springs clearly from an "independent origin." Nardone v. United States, 308 U.S. 338 (1939).

[888] Defendant's attempt to link Log 4 to his conviction must similarly fail. To construe a passing reference to "them whities" as being the Department's basis, or even partial reason, for holding the defendant's beliefs to be political and racial is completely untenable. The conversation was not a theological discussion. The common slang reference was not within a context which could have had any bearing on the defendant's beliefs. A Negro not a member of the Nation of Islam would be as likely to say the same thing. In addition, if it had been in such a context, and it could be construed to be even viciously derogatory, again there was ample evidence from an independent origin before the Department to conclude that the Muslim religion holds the white race in contempt. See Clay v. United

States, supra, at 219, n. 16.

As regards Logs 1 and 3, they are so totally innocuous even defendant's counsel could not point to any specific language which could bear on the defendant's conviction. The thrust of defendant's argument concerning these logs, as well as Logs 2 and 4, was that there must have been other matters discussed by the parties which were relayed to the Department of Justice. The court does not credit this argument. The testimony was clear that the original tapes were erased immediately after the logs were typed, and that the logs received in evidence were the only ones prepared. The individuals who monitored the conversations in Phoenix testified that they communicated no other information to anyone. The evidence also substantiates, without the need for further discovery, that no other information from the Atlanta wiretap was communicated to any person in the Department of Justice. As to the notation on the Atlanta wiretap log, AT 1379-S*, the court credits the government's claim that this number was the number assigned to the telephone surveillance, and does not refer to any F.B.I. employee.

In Alderman v. United States, supra, the Court said that "[n]one of this means that any petitioner will have an unlimited license to rummage in the files of the Department of Justice. [889] Armed with the specific records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a petitioner may need or be entitled to nothing else. Whether this is the case or not must be left to the informed discretion, good sense, and fairness of the trial judge." Id. at 185. And in Taglianetti v. United States, 394 U.S. 316 (1969), the Court said that "[n]othing in Alderman v. United States, Ivanov v. United States, or Butenko v. United States, ante, p. 165, requires an adversary proceeding and full disclosure for every issue raised by an electronic surveillance. . . . Here the defendant was entitled to see a

transcript of his own conversations and nothing else. He had no right to rummage in government files." Id. at 317. Despite the foregoing, the defendant's counsel insistently requested what would be, in essence, a full-scale inquiry into F.B.I. practices. The court does not believe that anything was shown which would warrant such an inquiry. Defendant had ample opportunity to demonstrate first, that the logs contained prejudicial material, and second, that the material was communicated to and was used by the Department of Justice in making its recommendation. Had he established the first, perhaps more extensive discovery would have been in order. But the defendant should not be permitted such broad discovery to attempt to prove transmittal of the information if he cannot first show that the information could have been, even in part, relevant to his conviction.

It might be added that Taglianetti v. United States, supra, intimates that the district court could, in some circumstances, make the determination that wiretap evidence is innocuous in an in camera inspection. This is, the court believes, such a case. Nevertheless, an adequate opportunity was given the defendant to prove relevance in an adversary proceeding. The proceeding was as extensive as Alderman requires. He failed to show the requisite relevancy, and the conviction must stand.

[890] II.

As noted earlier, "a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary." Giordano v. United States, supra, at 313. The court held with regard to the fifth wiretapped conversation that the surveillance was lawful. The log of that conversation, along with the authorization for the wiretap, was sealed and returned to the United States Attorney.

Whether the Attorney General's authorization of a wiretap for the purpose of gathering foreign intelligence information violates the Fourth Amendment is an issue of extreme gravity. It has never been decided by the Supreme Court, and this court

will not speculate on the direction in which the Justices will lean. See concurring opinion of Justice Stewart in Giordano v. United States, supra, at 314-15. The court is aware, of course, of the abuses possible should an Attorney General authorize extensive wiretaps under the guise of collecting foreign intelligence information. But the court also recognizes that such investigations are, in many instances, vital to the maintenance of national security.

The court agrees with the government's counsel that in determining whether to employ wiretapping, the President or the Attorney General must make a judgment based on foreign policy considerations. It would not be feasible for the executive to attempt to bring to the court's attention all the factual and policy considerations supporting the decision. Moreover, it is the executive, not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonableness of such a surveillance. From a purely practical standpoint, it is ridiculous to place on a United States Commissioner the burden of deciding what is and what is not a threat to national security. The court does not believe the judiciary should question the decision of the executive department that such surveillances are reasonable and necessary to the protection of the national interest.

[891] For the foregoing reasons, the defendant's motions to dismiss or set aside the verdict of the jury, sentence and indictment, and for a new trial, will be denied.

The defendant will present himself before the court for sentencing on Thursday, July 24, 1969, at 9:30 A.M.

Done at Houston, Texas, on this, the 14th day of July, A.D. 1969.

/s/ Joe Ingraham

United States District Judge

Prior Opinion of the Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24991

CASSIUS MARSELLUS CLAY, JR.,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(May 6, 1968.)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

AINSWORTH, Circuit Judge: "It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it." Chief Justice Edward Douglass White, *Selective Draft Law Cases*, 245 U. S. 366, 378, 38 S. Ct. 159, 161 (1918).

Cassius Marsellus Clay, Jr., also known as Muhammad Ali, heavyweight professional boxing champion

of the world, was convicted after trial by jury on an indictment charging violation of 50 U.S.C. App. § 462, for knowingly and wilfully refusing to report for and submit to induction into the armed forces of the United States. Clay's draft case has been through practically every phase of selective service procedure, beginning with the date he registered on April 18, 1960, until he was ordered to report but declined to submit to induction on April 28, 1967, and was thereafter convicted by jury trial held on June 19, 20, 1967. On four different occasions he was classified 1-A (Available for military service) by his local board, twice by two different appeal boards (in Kentucky and Texas) and once by the National Selective Service Appeal Board (the Presidential Appeal Board). In every instance the vote of the boards was unanimous.

There has been no administrative process which Clay (Ali) has not sought within the Selective Service System, its local and appeal boards, the Presidential Appeal Board and finally the federal courts, in an unsuccessful attempt to evade and escape from military service of his country. Being entirely satisfied that he has been fairly accorded due process of law, and without discrimination, we affirm his conviction.

The pertinent but lengthy chronology of his case follows:

Prior Opinion of the Court of Appeals

April 18, 1960—Clay (Ali) registered for selective service with Local Board No. 47, Louisville, Kentucky.

March 9, 1962—Registrant was classified 1-A by Local Board No. 47, Louisville, Kentucky.

March 26, 1964—Registrant was classified 1-Y as a result of a physical examination, as being not acceptable for induction in the armed forces and not qualified under current standards.

February 17, 1966—Registrant was reclassified 1-A by Local Board No. 47, Louisville, Kentucky, after having been considered by the Examining Station in accordance with current regulations and found fully acceptable for induction.

February 18, 1966—1-A classification notice was mailed to registrant. Clay (Ali) was furnished Special Form for Conscientious Objector (SSS Form 150).

February 28, 1966—Special Form for Conscientious Objector was filed by registrant with the local board. This was the first time such a claim had been made. Registrant requested a personal appearance before the local board in reference to the change of his classification from 1-Y to 1-A.

March 17, 1966—The local board granted a personal appearance before it by registrant and again classified him 1-A.

Prior Opinion of the Court of Appeals

March 28, 1966—Registrant appealed the 1-A classification to the Kentucky Appeal Board.

May 6, 1966—The Kentucky Appeal Board reviewed the file de novo and tentatively determined that the registrant was not entitled to the 1-O, conscientious objector or lower, classification. The complete file was referred to the Department of Justice for an advisory recommendation as provided by Selective Service Regulations (32 C.F.R. § 1626.25), and an investigation by the Federal Bureau of Investigation was requested by the Department.

August 23, 1966—Registrant filed a letter request with Local Board No. 47, Louisville, Kentucky, for reclassification to IV-D as a minister of the Lost Found Nation of Islam (Black Muslims).

August 23, 1966—The FBI investigation having been made, a special hearing was held in Louisville, Kentucky, to consider registrant's conscientious objector claim. The Hearing Officer reported his belief that the registrant was sincere in his conscientious objector claim.

November 25, 1966—The Department of Justice, Office of Legal Counsel, Conscientious Objector Section, recommended to the Kentucky Appeal Board that the request of the registrant for conscientious objector status be denied. Registrant was mailed a copy of the recommendation on November 29, 1966.

January 10, 1967—The Kentucky Appeal Board denied the requested conscientious objector claim and notified the registrant that he was classified 1-A.

January 12, 1967—Local Board No. 47, Louisville, Kentucky, reviewed the registrant's complete file but declined to reopen his classification. The board agreed unanimously that registrant was not entitled to the IV-D ministerial exemption.

January 19, 1967—Pursuant to the written request of General Lewis B. Hershey, the National Director of Selective Service, Local Board No. 47, Louisville, Kentucky, reopened and considered anew the classification, including the claim for ministerial classification, and after re-examining the registrant's file again classified him 1-A, and notice of classification was mailed to registrant.

January 26, 1967—Registrant appealed the 1-A classification and requested that the Appeal Board for the Southern District of Texas (the place of his current domicile at Houston, Texas) hear the appeal.

February 15, 1967—The Appeal Board for the Southern District of Texas classified registrant 1-A and returned his file to Kentucky on February 20, 1967, after finding that no new information had been submitted relating to his consoientious objector claim, and having considered and rejected his claim for ministerial exemption.

February 24, 1967—The National Director of Selective Service, General Lewis B. Hershey, appealed

the registrant's classification to the National Selective Service Appeal Board (the Presidential Appeal Board). (See 32 C.F.R. § 1627.1 for the authority of the National Director to do so.) Registrant could not file such an appeal because the regulations (32 C.F.R. § 1727.3) require that one or more members of the appeal board dissent from the classification before a registrant has such a right to file the appeal himself.

March 6, 1967—The Presidential Appeal Board unanimously voted to classify the registrant 1-A, and a copy of "Minutes of Action Upon Appeal to the President" was forwarded to the local board on March 14, 1967.

March 14, 1967—Local Board No. 47, Louisville, Kentucky, ordered the registrant to report for induction on April 11, 1967, at Louisville, Kentucky.

March 24, 1967—Registrant requested a transfer of induction to Houston, Texas, which was granted by Local Board No. 61 at Houston.

March 29, 1967—Local Board No. 61, Houston, Texas, ordered registrant to report to it on April 28, 1967, for delivery to the induction station.

April 28, 1967—Registrant reported for but declined to submit to induction on the grounds of his religious beliefs as a minister of the Islam Religion.

May 8, 1967—Registrant was indicted for violation of 50 U.S.C. App. § 462.

June 19, 20, 1967—Registrant was tried and convicted by a jury of the selective service violation for refusing to submit to induction, and sentenced to five years' imprisonment and a fine of $10,000.[1] This is his appeal from the conviction and sentence.

Clay (Ali) has no prior criminal record and no previous charges or convictions for crime, other than minor traffic violations.

The registrant has, therefore, exhausted every administrative remedy provided by Selective Service. He has also fully pursued his rights in the United States courts in a vain attempt to stop his induction before his trial and conviction in the present case.

In Kentucky, registrant, who is a Negro, filed suit in the United States District Court for the Western District of Kentucky to prevent his induction into the armed forces. In his suit he sought a declaration that the Universal Military Training and Service Act is unconstitutional on its face and as applied because of "systematic exclusion" of Negroes from membership on draft boards; also, for an injunction to restrain all draft boards in Kentucky from performing their functions until Negroes were appointed to boards in proportion to their ratio to the population. He sought to enjoin further classification and induc-

[1] The District Judge said in this regard:

"Well, I am going to impose the maximum penalty because under the rules at the end of an appeal if it is reversed, why, of course it is nil. If it is affirmed it is then subject to motion to reduce, and I find that we get into problems when clemency is given at the time of sentencing and then following an affirmance there is another petition for clemency." (R. 277)

tion of Negroes until this had been accomplished. The District Court denied relief, holding that no evidence had been submitted and no contention made that Clay (Ali) had been deprived of any right of appeal or other administrative process of Selective Service; that there was no evidence that he had personally been singled out and subjected to punitive action or other discriminatory treatment by the System. The District Court said that the issues were not appropriate for judicial review until the registrant either submitted to induction or refused to submit to induction, at which time the issues could be raised either by habeas corpus or in defense to a criminal prosecution. The District Court also held that except in rare circumstances, not present here, it was not the function of the judiciary to enjoin the operation or enforcement of the Universal Military Training and Service Act. A stay of injunction pending appeal was refused. *Muhammad Ali v. Breathitt*, D. C., W. D. Ky., 1967, 268 F. Supp. 63. Registrant petitioned the Sixth Circuit for leave to appeal and for temporary restraining order pending appeal, which was denied, the Court taking cognizance of the District Judge's denial of a certification that immediate appeal was warranted and the denial of an order staying proceedings (Unpublished opinion, 6 Cir., Docket No. 17787, March 28, 1967.) The Sixth Circuit, on April 17, 1967, denied registrant's application for an order staying orders of the District Court and for an injunction pending appeal. (Unpublished opinion, 6 Cir., Docket No. 17834.) On the same day, the Supreme Court denied registrant's application for stay of the

order of the United States District Court for the Western District of Kentucky, for injunction pending appeal and denied leave to file a petition for mandamus. *Muhammad Ali v. Gordon*, 386 U. S. 1002, 87 S. Ct. 1365 (1967). Rehearing was denied by the Supreme Court on April 24, 1967. 386 U. S. 1027, 87 S. Ct. 1388. On the same day, the Supreme Court also denied petition for writ of certiorari to the Sixth Circuit. *Muhammad Ali v. Gordon*, 386 U. S. 1018, 87 S. Ct. 1376.

In Texas the registrant filed a similar suit in the United States District Court, Southern District of Texas, raising substantially the same legal contentions as those in the Kentucky suit. The District Court (Judge Hannay) denied relief and ruled that the selectee's remedy could only arise after the final step toward military induction and should he refuse this step, his remedy would lie in whatever defense he claimed in the criminal prosecution. The District Judge said that a second remedy available was that of habeas corpus in the event the selectee should take the final step toward military induction while claiming that his induction was illegal, unconstitutional and void. *Muhammad Ali v. Connally*, D. C., S. D. Tex., April 28, 1967, 266 F. Supp. 345.

The registrant appealed from the District Court decision. He also filed application to stay and for interim injunction pending appeal, which was denied by the District Judge. He then petitioned Judge John R. Brown of the Fifth Circuit (now Chief Judge) for in-

junction pending appeal, which was denied,[2] and the matter was then referred to a panel of this Court (Judges Gewin, Coleman and Simpson), which also denied the motion for stay and injunction pending appeal. (Unpublished order, 5 Cir., Docket No. 24714, May 11, 1967.)

After refusing induction on April 28, 1967, appellant filed another suit in the United States District Court, Southern District of Texas, on April 29, 1967, for similar relief, which was denied on May 1, 1967 by Judge Seals for substantially the same reasons assigned by Judge Hannay in the prior case, the District Judge being of the opinion that the subsequent refusal of induction did not suffice to create a remedy for injunctive relief. At the same time an application for a stay and for an interim injunction to the District Court pending appeal was also denied. A panel of the Fifth Circuit (Judges Gewin, Coleman and Simpson), on May 11, 1967, thereafter denied a motion for stay or

[2] Judge Brown in detailed reasons for his refusal (unpublished opinion) said in part:

"I conclude that on traditional principles the equities—which includes the public interest—argue against such relief. I would not intimate what the intrinsic merits are—but I am convinced that the chances of success on appeal are so remote that I ought not to grant it.

. . . .

"Balancing these factors I do not think that the courts should intervene to test, on the application of every registrant, the statutory validity of the process. The law will not finally ever compel the unlawful conscription of a citizen or permit criminal punishment for failure to submit to unlawful orders. That inconvenience, hardship or risk may be suffered if and until Congress prescribes other remedies—one of the perils of civilization and citizenship in a nation which calls on its citizens for the protection of its national and international interests."

injunction pending appeal of Judge Seals' decision. (Unpublished order, 5 Cir., Docket No. 24723.)

Appellant, having been indicted on May 8, 1967 for the selective service violation, then petitioned the Fifth Circuit for a writ of prohibition to restrain the impending trial, which petition was denied by a panel of this Court (Judges Tuttle, Washington and Simpson) on May 15, 1967. (See unpublished order, 5 Cir., in Docket No. 24750.)[3]

We summarize the principal questions for decision as follows:

1) Was the selective service induction order to appellant invalid because of alleged systematic exclusion of Negroes from draft boards?

2) Did the District Court err in refusing to grant appellant's request for the production of certain documentary and other evidence?

3) Was there a basis in fact for the denial to appellant of a ministerial exemption?

4) Was there a basis in fact for the denial to appellant of conscientious objector status?

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[3] The appeal to the Fifth Circuit from Judge Hannay's ruling (Docket No. 24714) was dismissed for want of prosecution on July 28, 1967; and the appeal from the ruling of Judge Seals (Docket No. 24723) was dismissed for want of prosecution on September 5, 1967.

5) Did the proceedings as a whole, selective service and judicial, constitute a prohibited bill of attainder?

I.

THE ALLEGED SYSTEMATIC EXCLUSION OF NEGROES FROM SELECTIVE SERVICE BOARDS

The Selective Service System is based on the constitutional provision which grants to Congress the power "To raise and support Armies . . . . " U. S. Const. art I, § 8(12). The Universal Military Training and Service Act provides (50 U.S.C. App. § 460(b)(3)) that the President is authorized to create civilian local boards and appeal boards. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors of each of the states. No member of any local board shall be a member of the armed forces but each member shall be a citizen residing in the local board jurisdiction. Appeal boards shall also be composed of citizens who are not members of the armed forces and consist normally of five members appointed by the President upon recommendation of the governor. The appeal board shall be a composite board representative of the activities of its areas and shall include one member from labor, one member from industry, one physician, one lawyer and, where applicable, one member from agriculture. (32 C.F.R. § 1604.22.)

Thus the racial composition of the local and appeal boards about which appellant complains; because of

the absence of a proportion of Negroes in accordance with their ratio to the population, results from appointment by the President upon recommendation of the governor of each state. The appointments are therefore federal, not state.

There is also a National Selective Service Appeal Board (sometimes called the Presidential Appeal Board) composed of three members who are appointed by the President from citizens who are not members of the armed forces. This board acts for the President himself, being vested with the functions and duties of the President provided by the Act (50 U.S.C. App. § 460(b)(3)), which reads in pertinent part as follows:

> "The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title, and the determination of the President shall be final."

This board shall be in all respects independent of the Director of Selective Service. (32 C.F.R. § 1604.6 (a), (b), (c).) It was stipulated in the present record that one of the three members of the Presidential Appeal Board was a Negro. However, there was no Negro member on any of the local or appeal boards which considered appellant's draft case.

According to the report of the National Advisory Commission on Selective Service (the Marshall Com-

mission), in Kentucky, only 0.2% of 641 local board members is Negro, though 7.1% of the total population is Negro. In Texas, only 1.1% of local board members is Negro, though 12.4% of the total population is Negro. In the City of Louisville, the total population (1964) is 389,044, of which the white population is 310,717 and the Negro population 78,245, or 21% of the total population.[4] The Jefferson County, Kentucky, total population (1960) number 610,947, of which there are 532,057 whites and 78,350 Negroes, or 12.8% of the total population. In Harris County, Texas, of a total population of 1,243,158, 19.81%, or 246,351, is Negro.[5]

According to the Marshall Commission Report, the unequal percentage of Negroes on draft boards was not peculiar to Kentucky, Texas or the South, but the imbalance was nationwide. Only in the District of Columbia and in Delaware were there substantial percentages of Negroes on the boards. In twenty-three states, there were no Negroes on draft boards, the Report stated.[6]

Nevertheless the Marshall Commission said significantly in its report, "There is no evidence that the

[4] Appellant's brief asserts the Negro population of Louisville (1964) to be 78,327 and the percentage of Negroes to be 20.1%—a slight error. The difference is, of course, not significant. See Special Censuses, Series P-28, No. 1377, Louisville, Kentucky (United States Department of Commerce).

[5] Appellant in brief supplies other calculations from the record as follows: 9.60% of the total population of the Western District of Kentucky is Negro; 14.25% of the total population of the Southern District of Texas is Negro.

[6] For example, there were no Negroes on draft boards in such states as Indiana, Iowa, Kansas, Maine, Minnesota, New Jersey and Rhode Island.

variability of the Selective Service System leads to any systematic biases against poor people, or Negroes, insofar as the final proportion of men serving in the Armed Forces is a measure of this."

As a direct result of the Marshall Commission Report, the President in his message to the Congress on Selective Service dated March 6, 1967, instructed the Director of the Selective Service System to work with the governors "to assure that all local boards are truly representative of the communities they serve and to submit periodic reports on the progress in this area."

The Universal Military Training and Service Act in its congressional declaration of policy declares that the obligations and privileges of serving in the armed forces should be shared generally in accordance with a system of selection which is "fair and just" (50 U.S.C. App. § 451(c)). The Act further provides (50 U.S.C. App. § 455(a)) that "The selection of persons for training and service . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted: *Provided*, That in the selection of persons for training and service under this title . . . , and in the interpretation and execution of the provisions of this title . . . , there shall be no discrimination against any person on account of race or color: . . . ."

The Selective Service Regulations (32 C.F.R. § 1622.1(d)) provide, "In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice."

Appellant argues that the quoted statistics evidence racial exclusion in the composition of draft boards, in violation of the Fifth Amendment. He cites *United States v. Jefferson County Board of Education*, 5 Cir. 1966, 372 F. 2d 836, 837, aff'd on rehearing, en banc, 380 F. 2d 385 (1967), cert. denied, sub nom. *Board of Education of the City of Bessemer v. United States*, 389 U. S. 840, 88 S. Ct. 77 (1967), where this Court said that it has frequently relied on percentages in jury exclusion cases and in other civil rights cases for evidence of deliberate discrimination against Negroes. He concludes that if systematic exclusion of Negroes is constitutionally barred in the composition of juries, their exclusion in the Selective Service System likewise infringes his rights and requires a holding that draft boards, such as those in Kentucky and Texas which considered appellant's case, have no jurisdiction over appellant or in fact over any Negro. Thus he argues that the local boards have acted beyond their jurisdiction and may not act as to that class of registrants (including appellant) against whom it is claimed the appointing process has discriminated. Appellant concedes that considerable progress in rectifying this disparity in the several states has been

made since the President's March 6, 1967, message to Congress on Selective Service, but contends that Negroes should not be selected in the future until the alleged systematic exclusion of members of that race from draft boards has ceased.

Appellant likens his classification and induction into the armed forces to a criminal prosecution because, as in a criminal prosecution, the Government restrains a registrant of his liberty and may even cause his death by sending him into combat.

No court has held, so far as we can determine, nor do we here, that a Negro registrant for selective service is entitled to be classified and inducted by a selective service board composed of a percentage of Negro members which the Negro population bears to the total population, or that a board lacks jurisdiction of a registrant unless so constituted. No question is raised that the boards which considered appellant's classification were not regularly and properly constituted under appointment by the President, recommended by the governor. We do not justify the failure to include substantial numbers of Negroes on such boards. The Selective Service System must not only be fair, it must likewise have the appearance of fairness. Negro draftees should be selected for military service by a system which gives Negro citizens a full participation in the selection process. The Marshall Commission affirmed the necessity of greater participation by Negroes who are underrepresented as a class on local draft boards.

The Commission said that the Negro's position in the military manpower situation is in many ways disproportionate, even though he does not serve in the armed forces out of proportion to his percentage to the population. The President in his March 6, 1967, message to Congress said in this regard: "The Nation's requirement that men must serve, however, imposes this obligation: that in this land of equals, men are selected as equals to serve. A just nation must have the fairest system that can be devised for making that selection:" We concur with these remarks to the fullest. But nothing we have said justifies exemption from service in the armed forces for Negro registrants.

It is undeniable, as appellant contends, that conscription deprives an individual of his liberty and may even take his life. But we cannot properly compare the military draft to a criminal prosecution. There is no stigma attached to wearing the military uniform of the United States. To the contrary, it is a badge of the highest honor. Service under the flag of our country cannot properly be likened to imprisonment in a penitentiary. A proud nation with a long tradition of valor and bravery on the battlefield, with vivid memories in modern times of distant places where Americans have fought and died to preserve freedom, some with unusual names, such as Chateau-Thierry, Normandy, Iwo Jima and Khe Sanh, would never permit a comparison so odious. It is the same willingness of Americans to sacrifice their lives in the military service of the country which has made it

possible to establish the United States as a free nation, and which has successfully warded off the encroachments of its enemies. "The knowledge that military service must sometimes be borne by—and imposed on—free men so their freedom may be preserved is woven deeply into the fabric of the American experience." President Johnson, Message on Selective Service to the Congress, March 6, 1967.

The Government argues—and we agree—that a draft board system which does not have a sufficiently representative number of Negro members is comparable to a malapportioned legislature. The acts of such a legislature are not invalid and the laws which it passes are not null and void. The acts of a malapportioned legislature or local or county commission or board are acts of a de facto political authority and valid despite their failure to be apportioned in accordance with *Baker v. Carr*, 369 U. S. 186, 82 S. Ct. 691 (1962), and *Avery v. Midland County, Texas*, ... U. S. ...., 88 S. Ct. 1114 (1968).

Nor is appellant's argument meritorious that composition of draft boards is similar to that of grand and petit juries. The right to trial by jury has specific constitutional authority. However, nothing in the Constitution or the Universal Military Training and Service Act requires racially proportionate selective service boards. It is not difficult to understand the reasons which support the prior rulings of the Supreme Court and this Court in the jury selection cases where convictions have been set aside for

failure to have representative numbers of Negroes on jury venires. See *Whitus v. State of Georgia*, 385 U. S. 545, 87 S. Ct. 643 (1967); *Rabinowitz v. United States*, 5 Cir., 1966, 366 F. 2d 34; *Mobley v. United States*, 5 Cir., 1967, 379 F. 2d 768. The boards are administrative agencies with specific duties, many of them purely ministerial, which are provided for by the Act and Selective Service Regulations. A jury's verdict arrived at by secret deliberation has a finality which is not at all applicable to selective service classification and induction. As we shall see, draft board appeals are considered de novo and are not judicial proceedings.

The war powers of Congress to raise and support armies are constitutionally authorized and are of paramount public importance because they directly involve the protection and preservation of the nation itself. In this vital and sensitive area it behooves the judiciary to recognize the imperative necessity for the maintenance of the national integrity as upheld by the military forces of the United States. The Universal Military Training and Service Act provides that "every male citizen of the United States" between certain ages shall register and be subject to induction in the armed forces of the United States. Exemptions from service, such as for conscientious objectors or ministers of religion, are matters of legislative grace. *United States v. Mohammed*, 7 Cir., 1961, 288 F. 2d 236, 242; *Parrott v. United States*, 9 Cir., 1966, 370 F. 2d 388, 391. It has been long established that there is no constitutional right to exemp-

tion from military service by virtue of conscientious objection or religious calling. *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, 900, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *George v. United States*, 9 Cir., 1952, 196 F. 2d 445, 449. These exemptions do not spring from the Constitution but from the Congress. *George v. United States, supra.* The Supreme Court said in *Jacobson v. Massachusetts*, 197 U. S. 11, 29, 25 S. Ct. 358, 362 (1905), that despite the liberty secured by the Fourteenth Amendment a person "may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense."

It will be recalled that there were seven different occasions on which appellant was classified 1-A; four by his local board, twice by two different appeal boards in Kentucky and Texas, and once by the Presidential Appeal Board. The appeals in each instance were considered de novo.[7] "It is universally held that the Appeal Board considers matters of classification *de novo* and its classification is one of first instance, not a mere affirmance or reversal of the Lo-

[7] As to the appeal boards, the Regulations provide (32 C.F.R. § 1626.26):

"(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken: . . . ."

"The state appeal boards make a de novo classification." Comment, *The Selective Service*, 76 Yale L. J. 160, 171 (1966).

cal Board, and that any . . . prejudice on the local level is cured by a fair consideration on the appeal." *DeRemer v. United States*, 8 Cir., 1965, 340 F. 2d 712, 719; *United States v. Van Hook*, 7 Cir., 1960, 284 F. 2d 489, 491; *Ayers v. United States*, 9 Cir., 1956, 240 F. 2d 802, 809, cert. denied, 352 U. S. 1016, 77 S. Ct. 563 (1957); *Davis v. United States*, 8 Cir., 1953, 203 F. 2d 853. The action of the board of appeals completely supersedes the action of the local board in classifying appellant although the classification is the same. *Cramer v. France*, 9 Cir., 1945, 148 F. 2d 801; *United States v. Moore*, 7 Cir., 1954, 217 F. 2d 428, 431, 432. If the local board erred, the error was cured by the de novo action of the appeal board. *United States v. Chodorski*, 7 Cir., 1956, 240 F. 2d 590, 593.

The appeal to the Presidential Appeal Board was also de novo.[8] Any error or invalidity in the selective service procedures up to and including the Presidential Appeal Board was cured by de novo consideration by that board which acted in the place and stead of the President himself. One third of the membership of the Presidential Appeal Board (one of three) was a Negro, which is obviously a greater proportion than Negroes bear to the total population. The deci-

[8] The powers of the President upon an appeal (and necessarily of the Presidential Appeal Board which acts for him) are as follows (50 U.S.C. App. § 460(3)):

> ". . . power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title . . . , and the determination of the President shall be final."

"There is no personal appearance before the President's Board, which makes a de novo classification based on the materials in the registrant's file." Comment, *The Selective Service*, 76 Yale L. J. 160, 172 (1966).

sion of the board was unanimous that appellant should be classified 1-A, which action thereby cleared the way for his induction into the armed forces. Nowhere in the record in this case or in appellant's brief do we find any specific charge or evidence of discrimination against appellant because he is a Negro. There are conclusory allegations that the absence of Negroes from local and appeal boards (other than the Presidential Appeal Board) in and of itself establishes discrimination. But we have been unable to find any evidence which shows in the slightest particular that the treatment accorded Clay (Ali) by any board or member thereof was different from that given to any other registrant. Afforded every procedure known to the Act and the regulations, and an appeal to the Presidential Appeal Board to which he was not specifically entitled, appellant's refusal of induction and subsequent trial and conviction by a jury are the result of his own voluntary choice to violate the law of the land.

The contentions of appellant were given final and conclusive consideration by the highest tribunal within the System, a board entirely independent of the Director of Selective Service, and the decision was the same—that appellant be classified 1-A, thereby making him available for induction into the armed forces. The action of the Presidential Appeal Board, a board in which there was no racial imbalance, and the subsequent refusal of appellant to be inducted, are, without more, sufficient to affirm the conviction.

II.

DENIAL OF APPELLANT'S REQUEST FOR PRODUCTION OF CERTAIN DOCUMENTARY AND OTHER EVIDENCE

Prior to trial appellant sought discovery of certain evidence in connection with his allegation of systematic exclusion of Negroes from the System and racial discrimination against him. He moved the Court under Rule 16, Federal Rules of Criminal Procedure, that the Government produce all records of the National Advisory Commission on Selective Service showing the composition of draft boards in Texas and Kentucky and the details of the number of Negroes and whites classified for service and exempt or deferred from induction, other records of the Mark Clark Commission on Selective Service to the House Armed Forces Committee, all of the files of Local Board No. 47, Louisville, Kentucky, relating to registrants who claimed and were granted exemptions, minutes of the meetings of the Presidential Appeal Board and Texas Appeal Board, the entire draft board file of appellant, and the White House transcript of a press conference by the President on March 9, 1967. He also moved to take the oral depositions of Lieutenant General Lewis B. Hershey, the National Director of Selective Service, Washington; United States Representative L. Mendell Rivers, Chairman, House Armed Services Committee, Washington; the members of the National Selective Service Appeal Board and the members of the Texas Ap-

peal Board. General Hershey was requested to bring with him his notes about a public statement on January 31, 1967, in which he predicted appellant would not be deferred. Representative Rivers was requested to bring the notes of his public statement on August 25, 1966, relative to a statement that if Cassius Clay was deferred by the Louisville Board, "You watch what happens in Washington." The members of the National Selective Service Appeal Board were to bring all records and to be examined about the minutes of meetings and communications between them relating to appellant's hearing. The same information was to be obtained from the members of the Texas Appeal Board. Appellant also moved to take the depositions by written interrogatories of the Governors of Texas and Kentucky, the Selective Service Directors of those states, General Hershey, members of the National Selective Service Appeal Board, members of Local Board No. 47, members of the Texas Appeal Board and Representative Rivers. Another application sought issuance of subpoenas duces tecum to Lyndon B. Johnson, President of the United States;* Ramsey Clark, Attorney General; General Hershey; the Chairman of Local Board No. 47, Louisville, Kentucky; the Chairman of the Texas Appeal Board; the Director of the National Selective Service Appeal Board, Representative Rivers and the Executive Director of the National Advisory Commission on Selective Service, whereby these witnesses were to produce certain books, papers and documents in their possession called for by the subpoenas.

* The request for a subpoena to the President was subsequently withdrawn by appellant's counsel.

A mass of material was, therefore, sought by these discovery techniques. The Trial Judge held a hearing, received briefs and permitted oral argument as to whether the requested discovery should be granted. Appellant's basic contention was that the information sought was necessary to prove systematic exclusion of Negroes in the Selective Service System and that there was lack of procedural due process in the handling of his case. The Government objected to the requested discovery and moved to quash the subpoenas duces tecum, contending that what appellant sought was to put the Selective Service System itself on trial by a congressional-type general investigation. The Government argued against permitting such an investigation of the System, and also that the material sought was irrelevant to any issue which might arise in the criminal trial.

The Government further contended that defense counsel was attempting to explore into the minds and mental processes of the administrative officers named in the subpoenas, was engaging in a "fishing expedition," and that much of the matter sought, though irrelevant, could be obtained from other sources. The District Court refused to order production of the discovery, documentary and other evidence sought by appellant. Nevertheless, much of it found its way into the record at the trial.[10] The

[10] In the present record are the following: Registrant's entire Selective Service file, the Report of the National Advisory Commission on Selective Service showing the percentages of Negroes on local boards throughout the states of the nation, Minutes of the Presidential Appeal Board relating to appellant's case, and the President's Message to the Congress on Selective Service dated March 6, 1967.

measure of discovery permitted by the Rules of Criminal Procedure is not intended to be as broad as in a civil case. Fishing expeditions are the order of the day in a civil action but not in a criminal case for in the latter only limited discovery is permitted. *United States v. Sermon*, D. C., W. D. Mo., 1963, 218 F. Supp. 871, 872, 873. A judge should, therefore, be sensitive to the rules of discovery, which are far more restrictive governing criminal discovery. *Campbell v. Eastland*, 5 Cir., 1962, 307 F. 2d 478, 487. Application for relief under Rule 16, Federal Rules of Criminal Procedure, is a matter within the sound discretion of the Court and the controlling test is whether there has been an abuse of discretion. *Gevinson v. United States*, 5 Cir., 1966, 358 F. 2d 761, 766; *Beatty v. United States*, 5 Cir., 1967, 377 F. 2d 181, 185, reversed on other grounds, 389 U. S. 45, 88 S. Ct. 234 (1967). We believe the District Judge's ruling was correct and that it was made in the exercise of reasonable discretion in the management of the proceeding. What the defense actually sought was to place the Selective Service System itself on trial by a broad, general, though vague and indefinite, investigation into its activities and procedures. Most of the evidence requested was immaterial to any defense which could be raised by appellant at his trial. The statistical information about the representation of Negroes on draft boards generally as well as in Kentucky and Texas was available from other sources and is in the record. It would have been grossly improper to place the members of the Presidential Appeal Board and the Texas Appeal Board

on the witness stand to determine from them what their reasons were for the selective service classification which they gave to appellant in this case. There was, therefore, no error in the ruling of the Trial Judge.

III.

DENIAL OF THE MINISTERIAL EXEMPTION

Scope of Review. In considering the propriety of appellant's classification, and the denial of a ministerial exemption and conscientious objector status, we must keep in mind that the Act provides that decisions of the local boards are final. (50 U.S.C. App. § 460(b)(3).) In the leading and much cited case of *Estep v. United States*, 327 U. S. 114, 122, 66 S. Ct. 423, 427 (1946), the Supreme Court said:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for

the classification which it gave the registrant."

Therefore, the scope of review of local board decisions in draft cases is very limited and the range of review is the narrowest known to the law. *Matyastik v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24269, February 12, 1968]; *Blalock v. United States*, 4 Cir., 1957, 247 F. 2d 615.[11] In *Blalock* the Fourth Circuit said:

> "The 'clearly erroneous' rule applied in equity appeals has no place here, nor even the 'substantial evidence' rule of the Administrative Procedure Act, 5 U.S.C.A. § 1009. Congress gave the courts no general authority of revision over draft board proceedings, and we have authority to reverse only if there is a denial of basic procedural fairness or if the conclusion of the board is without any basis in fact. Witmer v. United States, 348 U. S. 375, 75 S. Ct. 392, 99 L. Ed. 428; Goff v. U. S., 4 Cir., 135 F. 2d 610."

The courts do not sit as super draft boards, substituting their judgments on the weight of the evidence, nor should they look for substantial evidence

[11] "The registrant who wants to take his case to court will find little relief from that quarter. Indeed, he will find it difficult to obtain review at all. The courts have allowed review only by habeas corpus after induction and defense to a criminal prosecution for failure to report for induction." (citing *Witmer v. United States*, 348 U. S. 375, 377, 75 S. Ct. 392 (1955) in support of the text) Comment, *The Selective Service*, 76 Yale L. J. 160, 172 (1966).

to support such determinations. *Tamarkin v. United States*, 5 Cir., 1958, 260 F. 2d 436, 437; *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Dickinson v. United States*, 346 U. S. 389, 396, 74 S. Ct. 152, 157 (1953); *Witmer v. United States*, 348 U. S. 375, 75 S. Ct. 392 (1955).

In recent cases we have consistently supported the "basis in fact" test in connection with the classification of draft registrants by local boards. See *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Greer v. United States*, 5 Cir., 1967, 378 F. 2d 931; *Foster v. United States*, 5 Cir., 1967, 384 F. 2d 372; *Jones v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24565, January 17, 1968]; *Matyastik v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24269, February 12, 1968].[12]

The Ministerial Exemption. We turn now to the question of the denial of a ministerial exemption to appellant who claims to be a minister of the Lost Found Nation of Islam (Black Muslims). The Act provides that regular or duly ordained ministers of religion shall be exempt from service. (50 U.S.C. App. § 456(g).)

> "The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of re-

[12] For a further discussion of the narrow scope of review in draft cases, see Comment, *Fairness and Due Process Under the Selective Service System*, 114 Penna. L. Rev. 1015, 1019 (1966).

> ligion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister." (50 U.S.C. App. § 466(g), (2).)

See also 32 C.F.R. § 1622.43 (Selective Service Regulations) which places a regular minister of religion in Class IV-D. Most important, the registrant bears the burden of clearly establishing a right to the ministerial exemption and the board has no affirmative duty to ascertain whether or not the registrant qualifies for the exemption. *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967).

In *Dickinson v. United States*, 346 U. S. 389, 394, 395, 74 S. Ct. 152, 156, 157 (1953), a ministerial exemption case, the Supreme Court said:

> "The ministerial exemption, as was pointed out in the Senate Report accompanying the 1948 Act, 'is a narrow one, intended for the leaders of the various religious faiths and not for the members generally.' S. Rep. No. 1268, 80th Cong., 2d Sess. 13. Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. Cf. Cox v. United States, 1947, 332 U. S. 442, 68 S. Ct. 115, 92 L. Ed. 59. On the other hand, a legitimate minister

> cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an exemption claim on the dogma of its faith. That would leave a congregation without a cleric. Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under § 6 (g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation.' And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption."

The test, therefore, is whether a registrant, as a vocation, regularly, not occasionally, teaches and preaches the principles of his religion. There must be regularity of religious activities, a ministerial vocation rather than an avocation, and a recognized standing as a minister to a congregation or leader of a group of lesser members of his faith. *Wiggins v. United States*, 5 Cir., 1958, 261 F. 2d 113; *Fitts v. United States*, 5 Cir., 1964, 334 F. 2d 416; *Wood v. United States*, 5 Cir., 1967, 373 F. 2d 894, reversed on other grounds, 389 U. S. 20, 88 S. Ct. 3 (1967); *Greer v. United States*, 5 Cir., 1967, 378 F. 2d 931; *Foster v. United States*, 5 Cir., 1967, 384 F. 2d 372; *Jones v. United States*, 5 Cir., 1968, ... F. 2d ....

[No. 24565, January 17, 1968]; *Matyastik v. United States*, 5 Cir., 1968, ... F.2d .... [No. 24269, February 12, 1968].

Appellant was certified as a minister by the National Secretary of the Lost Found Nation of Islam and by its leader, Elijah Muhammad. He contends that he spends 90% of his time on his ministerial duties. He submitted 43 affidavits and documents said to contain the signatures of 3,612 people testifying to his ministerial activities. Finally he states that there was no evidence in his file upon which a "basis in fact" could be found to support his 1-A classification by the board. We are unable to agree with his statements or contentions. The file indicates that appellant joined his religious sect in January 1964. He has apparently earned his living as a professional boxer for a number of years and became professional heavyweight boxing champion of the world on February 25, 1964. Some years earlier he had won the world light heavyweight boxing championship at the Olympics at Rome. He contends that he became a minister of the Muslims in early 1964. In the first information which he supplied to his local board on selective service forms, his occupation was shown to be that of "professional boxer" and "professional prizefighter." The Report of Medical History dated January 24, 1964 showed his usual occupation to be "boxing." During all this time he made numerous trips to foreign countries to engage in professional bouts which he stated required daily physical training and exercise in preparation for these prizefights.

His Current Information Questionnaire dated February 2, 1966 listed his occupation as a "professional boxer" and his work as "professional fighting." Then, on February 17, 1966, the eventful and important date in this case, his 1-Y classification was changed by the local board to 1-A. Clay (Ali) had never stated to his board or claimed to be a minister or a conscientious objector prior to that time. He wrote Local Board No. 47 on February 14, 1966, just three days prior to his reclassification that "My occupation is professional boxer, and I am at present the Heavyweight Champion of the World." Even when he filled out the Special Form for Conscientious Objector dated February 28, 1966, though claiming to be a member of the Nation of Islam, he did not claim to be a minister. His letter of March 17, 1966 to Local Board No. 47 protested that his reclassification imposed "grave hardship upon me as heavyweight champion of the world at now age 24." When he appeared in person before Local Board No. 47 on March 19, 1966, boxing was listed as his livelihood. The evidence which the local board had before it was much more than necessary to constitute a "basis in fact" for his 1-A classification and denial of the ministerial exemption. His vocation is clearly that of a professional boxer.

IV.

DENIAL OF CONSCIENTIOUS OBJECTOR STATUS

Appellant's claim that he is a conscientious objector began on February 18, 1966, one day after his re-

classification to 1-A, at which time he was furnished the Special Form for Conscientious Objector. He was granted a personal appearance before Local Board No. 47 on March 19, 1966, pursuant to his request. The board's record of that appearance reflects that he claimed hardship on account of taking care of his parents and paying alimony to his former wife. The board's record states, "His religion teaches them not to take part in any way with infidels or any nonreligious group. They fight only in self-defense, not war. Boxing is considered his livelihood." Also, "Clay objects to being in service because he has no quarrel with the Viet Cong. Clay stated that he could not, without being a hypocrit, [sic] take part in anything such as war or anything that is against the Moslim religion." He wrote a lengthy letter to his local board dated April 16, 1966, in which he repeated his hardship request as the sole support of his mother and on account of having to pay alimony to his first wife. He protested that two years of military service would cause him serious financial loss in being unable to pursue his livelihood as a professional boxer.[13] The local board nevertheless reaffirmed the

[13] The pertinent part of the letter to the board reads as follows: "Two years is a very long time in the life of a heavyweight champ—from age 22 when I was classified from 1-A to 1-Y, and my present age 24. From age 24—to age 26 I may never be able to overcome this time of loss of boxing sharpness and come back from the service and earn the kind of money required to pay off these financial obligations, even though they may be abated during the time of military service. I would therefore be in hock for the rest of my life, whereas if I can get in a few more fights, which are lined up through the fall of this year, I should be able to settle these permanent financial obligations from the money I should get within this year, while I am at my peak of shape and am the Heavyweight Champion of the World. A 6-month defense is necessary to retain the title."

1-A classification and the registrant appealed to the appeal board. On May 6, 1966, the complete file was reviewed by the Kentucky Board of Appeals which tentatively determined that the registrant should not be classified in Class 1-O (conscientious objector) or in a lower class. See 32 C.F.R. § 1626.25(a), (b).

The Department of Justice then requested a Federal Bureau of Investigation investigation and a special hearing on the character and good faith of the conscientious objections of the registrant. (32 C.F.R. § 1626.25(d).)[14] The special hearing was held on August 23, 1966, at Louisville, Kentucky, before former Circuit Judge Lawrence Grauman as hearing officer. The hearing officer reported to the Department of Justice that the registrant stated his views in a convincing manner, answered all questions forthrightly, that he was impressed by the statements, believed the registrant was of good character, morals and integrity and sincere in his objection on religious grounds to participation in war in any form. He recommended that his conscientious objector claim be sustained. However, the Department of Justice in a detailed and comprehensive letter opposed his claim[15] and recommended to the Kentucky Board of Appeals that it not be sustained. The Department of Justice concluded that registrant's objections to participation in war insofar as they are based upon the

[14] The regulations follow generally the provisions of the Act on the procedure for considering conscientious objections. See 50 U.S.C. App. § 456(j).

[15] The Department's written objections are to be found in the file in a 17-page letter dated November 25, 1966 to the Chairman of the Appeal Board, Western District of Kentucky.

teachings of the Nation of Islam "rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form."[16] The De-

[16] For a penetrating analysis of the beliefs of the Black Muslims, see *Sostre v. McGinnes*, 2 Cir., 1964, 334 F. 2d 906, cert. denied, 379 U. S. 892, 85 S. Ct. 168 (1964). The Court said in that case (at 909):

> "Basic to the problem of prison discipline is the fact that the teachings of Elijah Muhammad include condemnation of the entire white race as wholly 'evil,' composed of devils, murderers, thieves, robbers, scientists at tricks, world snoopers, meddlers and liars.[4] Presenting almost equal difficulty is the Muslims' demand for total segregation between whites and blacks. These Muslims also adopt the position that the Christian religion is loathsome and despicable.[5]

[4] Elijah Muhammad has said:

> "'The white race or Caucasian European race is known to God and his prophets as Satan, the devil, the enemy of God and his people (the original nation) power was given to them to rule with evil and falsehood the darker nations for six thousand years. They have done and are now forty-six years overtime and they know this. It will take a few years to complete the separation. Nevertheless the work is going on now at a very good rate of speed.'
>
> "'The truth of the white race will make all black mankind hate them. The truth of the white race and kind will make all black mankind hate them regardless of their color; black, brown, yellow or red. The truth of the white race is a part of that secret which was withheld by Allah to allow them, the devils, to live their time, six thousand years.'
>
> "'If you understood it right you will agree with me that the whole Caucasian Race is a race of devils.'

"(The quotations are from the Supreme Wisdom containing 'the teachings' of the Honorable Elijah Muhammad. This work was an exhibit in the present case.)

"Malcolm X, at the time a 'minister' of the Muslims, said of an airplane accident in which more than 120 white people were killed:

> "'Well, somebody came and told me that he really had answered our prayers over in France. He dropped an airplane out of the sky with over one hundred twenty white people on it, because the Muslims believe in an eye for an eye and a tooth for a tooth, but thanks to

partment of Justice pointed out that only a general scruple against participation in war in any form can support a claim for conscientious objector status, citing *United States v. Kauten*, 2 Cir., 1943, 133 F. 2d 703.[17] The Department of Justice said that the registrant had not consistently manifested his conscientious objector claim and had not shown overt manifestations sufficient to establish his subjective belief where his claim was not asserted until military service became imminent, not having been made at all prior to being reclassified 1-A in February 1966, and cited in support thereof *Campbell v. United States*, 4 Cir., 1955, 221 F. 2d 454, and *United States v. Corliss*, 2 Cir., 1960, 280 F. 2d 808, cert. denied, 364 U. S. 884, 81 S. Ct. 167 (1960). Numerous statements by the registrant made from time to time were quoted by the Department of Justice in justification of its recommendation against the registrant's conscientious objector claim.[18]

God or Jehovah or Allah' we will continue to pray and we hope that every day another plane falls out of the sky.'

"[5] 'Bratcher said in the presence of white officers and white inmates, to another colored inmate, "This goddam Jesus Christ has got to go. He has served the purpose of the white man long enough."' (Testimony of A. J. Meyer.)"

[17] The Department of Justice's letter said in part: "It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad." (Letter p. 10.)

[18] The special hearing officer quoted the following passage from the registrant's letter to the local board dated February 14, 1966:

"'3. That I am a devoit Muslim and a follower of Islamic religious faith under the discipline of the prophet Elijah Muhammad. To bear arms or kill is against my religion and I conscientiously object to any combat military service that involves the participation in any war in which the lives

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The registrant was furnished with a copy of the adverse recommendation of the Department of Justice. The Kentucky Appeal Board thereafter reaffirmed the 1-A classification.

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of human beings is taken. This I do not believe to be righteous. This has been my faith upward of five years." [sic]"

The Department of Justice's letter recommendation said:

"It should be noted that while the resume statement of the attorney for the sponsoring group did, as noted by the Hearing Officer, express the opinion that registrant sincerely believes that he is conscientiously opposed to military service, the resume also reflects that the attorney believed that registrant would be sincere in his claim as a conscientious objector 'to the extent that registrant can be sincere in a belief'. The resume further reflects that the attorney 'could not be sure how deep any human conviction goes with the registrant' and that he is 'not certain as to what motivates the registrant in this respect.' (Resume, page 5) The attorney added that in view of his past experiences with the registrant changing his mind, he would not be surprised 'if a year from now the registrant becomes disenchanted with the Muslims and voluntarily joins the United States Marines.' The member of the sponsoring group, it should also be noted, stated that 'I'll go to my grave believing registrant basically is a good boy and was brainwashed first by his father and then by the Muslims.' (Resume, page 7)."

At the special hearing, in response to a question of the hearing officer, the registrant stated, "If the Honorable Elijah Muhammad looked me in my face and he who I believe is directly from Allah, Almighty God Allah, and if he looked at me and advised me, which I'm sure he wouldn't, to fight in any kind of war, if he advised me to I would." Then the registrant testified:

"Sir, I said earlier and I'd like to again, to make that plain, that it would be no trouble for me to accept conscientious objector on the basis that I'll go into the Armed Services boxing exhibitions in Viet Nam, or traveling the country at the expense of the Government or living in the easy life and not having to get out in the mud and fight and shoot and if this — — if I could do this, or if it was something I wanted to do, of was in my heart to do if it wasn't against my conscience to do it, I would easily do it. I wouldn't raise all this court stuff and I wouldn't go through all of this and lose and give up the millions that I gave up and my image with the American public that I would say is completely dead and ruined because of us in here now, and so I wouldn't turn down so many millions and jeopardize my life walking the streets of the South and all of America with no bodyguard if I wasn't sincere in every bit of what

Whether the registrant's beliefs are "truly held" is the threshold question of sincerity which must be resolved by the board. *United States v. Seeger*, 380 U. S. 163, 185, 85 S. Ct. 850, 863 (1965).[19] The "basis in fact" test applied to the conscientious objector claim of registrant was fully met in this case.

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the Holy Qur'an and the teachings of the Honorable Elijah Muhammad tell us and it is that we are not to participate in wars on the side of nobody who—on the side of non-believers, and this is a Christian country and this is not a Muslim country, and the Government and the history and the facts shows that every move toward the Honorable Elijah Muhammad is made to distort and is made to ridicule him and is made to condemn him and the Government has admitted that the police of Los Angeles were wrong about attacking and killing our brothers and sisters and they were wrong in Newark, New Jersey, and they were wrong in Louisiana, and the outright, everyday oppressors and enemies are the people as a whole, the whites of this nation. So, we are not, according to the Holy Qur'an, to even as much as aid in passing a cup of water to the—even a wounded. I mean, this is in the Holy Qur'an, and as I said earlier, this is not me talking to get the draft board—or to dodge nothing. This is there before I was borned and it will be there when I'm dead and we believe in not only that part of it, but all of it."

The registrant affirmed at the hearing that he was correctly quoted by the *Chicago Daily News* on February 18, 1966, the day after his reclassification to 1-A, as follows:

"I am a member of the Muslims and we don't go to no war unless they are declared by Ali himself. I don't have no personal quarrel with those Vietcongs.

• • •

"Let me tell you, we Muslims are taught to defend ourselves when we are attacked. Those Vietcong are not attacking me. These Vietcong are fighting a very nasty war over there. There is a lot of people getting killed. Why should we Muslims get involved? Besides, I am fighting for the government every day. I am laying my life on the line for the government. Nine out of ten soldiers would not want to be in my place in the ring. It is too dangerous."

[19] The Third Circuit recently rejected the claim of a Roman Catholic for conscientious objector classification who said he would fight only in a "just war" and that denial of such classification would violate his federally protected right to religious freedom and equal protection of the law. *United States v. Spiro*, 3 Cir., 1967, 384 F. 2d 159, cert. denied, ... U. S. ...., 88 S. Ct. 1028 (1968).

There was more than adequate evidence to justify the rejection of his claim.

V.

THE BILL OF ATTAINDER

The Constitution prohibits the passing of a bill of attainder by Congress, Art. I, § 9, Cl. 3, and a bill of attainder is said to be a legislative act which inflicts punishment without a judicial trial, *Cummings v. The State of Missouri*, 71 U. S. (4 Wall.) 277 (1867). As interpreted by the Supreme Court, this clause prohibits all legislative acts "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ." *United States v. Lovett*, 328 U. S. 303, 315, 66 S. Ct. 1073, 1078 (1946). Accordingly, appellant contends that the whole proceeding of his classification and induction into the military service constituted a prohibited bill of attainder. The only issue submitted to the jury at his trial was whether he refused to take the step forward at the induction ceremony. Appellant contends in brief that "Every important factual adjudication was extra judicially made by administrative bodies operating under the Act." Since the draft board's authority flows from congressional enactment, appellant argues that Congress has subjected him to a non-judicially imposed penalty in a non-judicial forum. He maintains that he was classified without a judicial trial.

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So far as the trial proceedings before the District Court are concerned, there was no irregularity or failure to provide due process of law. The District Judge informed the jury that he had examined the defendant's Selective Service File and found, as a matter of law, that there was a basis in fact for the 1-A classification given the registrant. The jury was instructed that it was not to consider the question of whether or not the defendant was entitled to this classification for this determination was not for the jury. This ruling and instruction was in exact conformity with the Supreme Court's teaching in *Cox v. United States*, 332 U. S. 442, 452, 453, 68 S. Ct. 115, 120 (1947), where the Court said:

> "Whether there was 'no basis in fact' for the classification is not a question to be determined by the jury on an independent consideration of the evidence. The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order."

Proceedings before local and appeal boards are informal and are stripped of the panoply of formal judicial tribunals. *United States v. Pitt*, 3 Cir., 1944, 144 F. 2d 169, 172. Such proceedings are non-judicial in nature and are clearly non-criminal, for appellant

was neither a suspect nor an accused and he was appearing before the boards which were giving him a hearing only in an administrative proceeding. *United States v. Sturgis*, 3 Cir., 1965, 342 F. 2d 328, 332. It is true that appellant sought a judicial determination of his case prior to induction, and the decision was adverse in every tribunal to which he presented this issue. The Sixth Circuit, in declining to grant him an injunction pending his appeal from the decision of the Kentucky Federal District Court, said:

> "We do not believe that Congress ever intended that draftees should have the right to litigate the validity of their induction before acceptance for National Service. If injunction suits were permitted, interminable delays would undoubtedly result while the cases were being processed in the Courts. Such a procedure would interfere with the orderly proceedings of the draft boards and prevent them from filling their quotas and supplying the armed forces with much needed personnel." *Muhammad Ali v. Breathitt*, 6 Cir., April 17, 1967, Docket No. 17834, unpublished.

Similar relief was also denied by the Fifth Circuit by its numerous orders to which we have previously referred.

The most recent amendment to the draft law (now called the Military Selective Service Act of 1967) permits judicial review only "as a defense to a criminal prosecution instituted. . . after the registrant has

responded either affirmatively or negatively to an order to report for induction."[20] The amendment was undoubtedly Congress' answer to the holding in *Wolff v. Selective Service Local Board No. 16*, 2 Cir., 1967, 372 F. 2d 817, in which the Second Circuit upheld preinduction judicial review[21] of a selective service classification which allegedly infringed upon the constitutional right to free speech. That case involved the reclassification of deferred students, making them available for military duty because of participation in Viet Nam. Preinduction consideration was afforded petitioners on the narrow constitutional ground that the reclassification would have a continued chilling effect, *Dombrowski v. Pfister*, 380 U. S. 479, 85 S. Ct. 1116 (1965), on them by being subjected to the added sanction of induction. It is

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[20] 50 U.S.C. App. § 460(b)(3), as amended in 1967, reads as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

[21] "While there was no serious question that eventually petitioners would be able to secure review, *Wolff* is the first case allowing direct judicial review of a registrant's classification prior to induction. It had been held almost without exception that aggrieved registrants could not challenge the determinations of their local boards in the courts except by either submitting to induction and seeking habeas corpus relief, or by refusing induction and securing review by way of a defense to a criminal prosecution." Comment, 81 Harv. L. Rev. 685, 686 (1968). The Government did not file a petition for certiorari in the *Wolff* case.

clear by the 1967 amendment to the Act that Congress intends there be no preinduction judicial proceedings which would interfere with the orderly drafting of needed manpower for the armed forces. *DuVernay v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24132, February 7, 1968]. Judicial review prior to induction, even on constitutional grounds, is an open invitation to a large volume of litigation, much of which we could expect would undoubtedly be based on frivolous grounds in an attempt to delay or evade military service. As the Supreme Court said in *Falbo v. United States*, 320 U. S. 549, 554, 64 S. Ct. 346, 349 (1944):

> "The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provisions were made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded 'a prompt and unhesitating obedience to orders' issued in that process 'indispensable to the complete attainment of the object' of national defense. Martin v. Mott, 12 Wheat. 19, 30, 25 U. S. 19, 30, 6 L. Ed. 537. Surely if Congress had intended to authorize interference with that

process by intermediate challenges of orders to report, it would have said so."

The registrant's remedy is in defense to a criminal prosecution if he declines induction, and habeas corpus if he accepts induction but is still aggrieved by the classification process. *Witmer v. United States*, 348 U. S. 375, 377, 75 S. Ct. 392, 394 (1955).[22]

In the present matter the registrant fully exhausted all administrative remedies available to him. In that respect the case differs from *DuVernay v. United States*, 5 Cir., 1968, ... F. 2d .... [No. 24132, February 7, 1968], where we affirmed the conviction of *DuVernay* because of his failure to exhaust administrative remedies. We also pointed out in footnote 6 of that case (..... F. 2d ....) that as to the attack on the racial composition of the local board, since draft board members are public officers appointed by the President, a challenge to the composition of the board indirectly challenges the qualifications of the present members and their eligibility to perform their duties. We said that the public officers'

[22] In *Schwartz v. Strauss*, 1953, 206 F. 2d 767, the Second Circuit affirmed on the opinion below (114 F. Supp. 438) the District Court's denial of relief to a plaintiff who sought a preinduction declaratory judgment and an injunction "claiming that his selective service classification is erroneous as a matter of law and that he is thereby deprived of certain constitutional rights." The District Court said "that there are many authorities that do not permit judicial review before induction" and that "the Congressional intent was to keep the administrative process of the Selective Service System free from the delays and disruption incident to court interference prior to induction." The Court said that "plaintiff's remedy is by way of habeas corpus after induction or by refusing to be inducted after the administrative process is complete." 114 F. Supp. at 439.

authority was not subject to collateral attack in the criminal proceeding but must be challenged by direct attack. *DuVernay's* conviction, however, was not affirmed on that issue but on the failure of the draftee to exhaust administrative remedies. While it is true that qualifications of a public officer generally may not be collaterally attacked, the charge of systematic exclusion of Negroes from draft boards in this case, where all administrative remedies have been exhausted, is of constitutional proportions and warrants our consideration and disposition of that issue. We do not view appellant's contention here as requiring the removal of draft board members because of so-called systematic exclusion or racial imbalance, but that appellant seeks to have their acts declared invalid as to him. It is apparent that the systematic exclusion contention must, therefore, be decided. Accordingly, we have given full consideration to that contention, now urged in this criminal proceeding, though we believe it is not applicable insofar as draft board membership is concerned, and, at the least, that the acts of such boards are de facto valid and binding. *United States v. Commonwealth of Pennsylvania*, D. C., W. D. Penna., 1963, 214 F. Supp. 913; *United States v. Lindsley*, 7 Cir., 1945, 148 F. 2d 22, cert. denied, 325 U. S. 858, 65 S. Ct. 1195 (1945). There is no question involved here of the board acting beyond its jurisdiction in classifying and attempting to induct appellant who, under the Act and regulations, is clearly a proper subject for military service in the armed forces of the United States. Since under the Act and the settled law the system-

atic exclusion contention may not properly be raised prior to induction, we have concluded that it is reasonable, all administrative and other remedies having been exhausted by appellant, that we meet the issue squarely and resolve it, which we have done.[23]

There is no merit to the bill of attainder argument as we have seen.

The conviction and sentence are, therefore, AFFIRMED.

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[23] Appellant raised another issue which is without merit. He claimed deprivation of due process because of the inclusion in his Selective Service File of numerous letters and newspaper clippings alleged to be prejudicial, and also because of pre-final classification statements of General Hershey, the National Director, and Congressman Rivers, Chairman of the House Armed Services Committee. We have heretofore described the statements of General Hershey and Congressman Rivers in Chapter II of this opinion. The record shows quite clearly that it is the practice of local boards to place all correspondence relating to a registrant in his file. A number of letters and clippings from members of the general public protesting the delay in inducting appellant were received by the board and filed. The record is devoid of any indication that these letters and clippings played any part whatsoever in the ultimate classification of appellant. That is also true of the statements of the General and Congressman. As to General Hershey's statement, we have already shown that board is independent of the National Director as provided in 32 C.F.R. § 1604.6(a), (b), (c), and it was General Hershey who caused an appeal of registrant's case to the Presidential Appeal Board. Obviously it is the right of Congressmen to express opinions on matters of public interest, including registrant's draft case. But nothing in the record of this case shows that Congressman Rivers' statement had any effect on the classification of appellant.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

Prior Order Denying Petition for Rehearing and Petition for Rehearing *En Banc*

(June 6, 1968)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is Denied.

Transcript of District Court's Oral Findings

(Rendered June 20, 1967)

The Court:

Well, I have read the draft board file and I have reached the conclusion there is ample evidence in the file to support the action of the draft board. Mr. Covington has said basis in fact must be found in the draft board file, and I think it is found here.

Now, just to summarize some of the evidence that I find that I conclude does support the action of the draft board, first I want to describe the file. I am doing this for the record, not because counsel on either side need it described for them. You know it as well as I do. It is not the neatest of files. There are many pages in it. To begin with there is I think the main portion of the file, just a group of loose sheets in the file and they are not arranged chronologically. They are numbered for convenience and identification consecutively as they appear in that file, but they are not in any chronological or other logical form, logical sequence.

I will ask that we have order in the courtroom. I do not intend to be facetious and what I say is not calculated to inspire laughter and what I had to say is serious. At least it is serious to me and I am sure it is serious to the Defendant and I hope it is serious to prosecution.

I am going to refer to these pages by the pencil figures that appear thereon. In other sections of the file there is pointed out there is quite a volume of petitions signed by brothers of the Defendant's religious faith. Most of them are on mimeographed forms. There are some variations in

the forms. You will find one form an identical form with many signatures on those petitions, and then another form. I read the various forms and observed that there are quite a number of signatures. I will take counsel's word for the number of signatures appearing thereon. I did not count the signatures. I did observe there are quite a volume of them.

Then there are those other miscellaneous—what Mr. Covington has referred to and I refer to as crank letters of people advising the draft board what to do, just as I have received many advising me what I should do. I did not even read them. I have asked my secretary to file them according to states. If we ever have to refer to them, we will refer to them in that way. I don't anticipate that we will.

I will say for the record out of the presence of the jury that I have received quite a volume of what I call crank mail and have received some telegrams. Most of them start off with the statement that they are not presuming to tell me what to do, and then they proceed to do that. That is the form of most of the letters I receive asking for jury excuses. In paragraph 1 they protest how conscientious they are of their civic responsibility and in paragraph 2 why they don't want to serve.

Proceeding further, in referring to matters in the file which I believe prove the basis in fact for the action of the draft board, and I'm not referring to any crank letters, I am not referring to newspaper clippings, and again I want to say that these letters are not arranged chronologically and I am referring to them in the order in which they appear in the file, which is not a chronological order.

On page 260 is a letter dated October 19, 1966. This was after the Defendant has made his claim for ministerial

exemption. It is a typewritten letter and it is signed by the registrant, the Defendant himself, and in that letter addressed to the draft board he asks leave to go to Mexico to negotiate a fight and to observe his prospective opponent in action. He didn't say anything in that letter that he was going there to preach the word of Allah or to seek converts, but his request to leave the country to go to Mexico was to negotiate a fight and to observe his prospective opponent in action. I think that would give some support to the finding of the draft board that he was a professional boxer as he claimed to be.

Then on page 467 is another letter, typewritten letter, signed by the registrant, the Defendant Clay, dated July 7, 1966. This letter was before his claim for ministerial exemption. The previous one was after. In that letter he asked leave to go to England to defend his world heavy weight championship and he also advised in that letter he would later want to go to Germany to defend his title there.

But again in the letter to the draft board the proposition of his projected visits out of the country to England and to Germany to defend his heavy weight championship. Again, he made no mention that he was going to those countries or that he would be going to those countries to preach the word of Allah.

Then at page 458 is another letter, typewritten and signed by registrant, Defendant Clay, dated August 8, 1966, which was a short time before he made his claim for ministerial exemption. In that letter he asked leave to go to Germany to defendant [*sic*] his world heavy weight championship there. He stated in his letter previously that he would have such a request. In July he told them he would have a request to go to Germany and, true to his

word, he did have such a request to go there, and why, to defend his world heavy weight championship there. Again, the request was not to go there for the purpose of preaching the word of Allah.

Then page 474 is another letter in his own handwriting signed by the registrant, Defendant Clay. This letter is dated April 26, 1966, and in this letter he asked to go to England to defend his world heavy weight boxing title. Again, no mention that he wanted to go there to preach the word of Allah.

At page 491 is another letter in his own handwriting and signed by the registrant, Defendant Clay, dated March 17, 1966, in which he protests the reclassification by the draft board and in his letter he states the reasons he does so protest. He protests his reclassification for the reason that the reclassification has and does at this time impose great hardship upon me as heavy weight champion of the world now at age 24. He asked the draft board to reconsider his classification. That is his protest, because of hardship. He says nothing there about a ministerial exemption.

Then at page 504, letter dated April 16, 1966 in his handwriting, signed by the registrant, Defendant Clay. This is a month later than the previous letter. Again, he protests his reclassification for the following reasons:

A, he says he is the sole support of his mother. B, because he had just gone through an expensive divorce and made a settlement of $150,000 on his wife and was required to pay her $1250.00 per month alimony; the conclusions being he couldn't do that on a soldier's pay. But, again, he protests his reclassification for entirely different reasons. I don't know why he didn't think then to claim that he was a minister, but he did not.

Then at page 524 appears another letter dated February 14, 1966, in his own handwriting. The letter is signed by

the registrant, Defendant Clay. He protests his reclassification for the following reasons:

One, my occupation is professional boxer—and he goes on with that explanation. Two, that he married August 14, 1964, divorced January 11, 1966 because his wife failed to comply with her premarital agreement as to the tenets of the Muslim faith. Then a divorce was expense: Three, that he is a devout Muslim and has convictions also against killing or bearing arms. Now, in this letter he protests his Muslim faith, his Muslim religion, but he does not say that he is a minister. He says that his marriage broke up because his wife did not follow through with her premarital agreement with the tenets of his faith, the Muslim faith, and then he says that he is a devout Muslim and has conscientious scruples against killing or bearing arms, but he makes no claim to being a minister.

Now, we are well aware that the Selective Service Act recognizes conscientious objectors. As I remember it, a conscientious objector may be assigned to non-combatant duty in the armed forces of the United States or he may be assigned to work of national importance under civilian direction. But that problem has never been brought to you. I don't think he has said in so many words, "I am an conscientious objector, I do not believe in killing or bearing arms and therefore I want to be assigned to non-combatant duty or to work of national importance under civilian direction."

I think the basis in fact for the action of the draft board is amply supported by the evidence appearing in the file, and I find that there was basis in fact for such action. I deny the motion for acquittal upon all of the grounds asserted.

It is now five minutes after four. How much time will you gentlemen want to present your arguments?

Affidavit of Attorney General Mitchell

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

[Title and number omitted; Clerk's certificate omitted.]

AFFIDAVIT

District of Columbia)
Washington, D. C.) ss

John N. Mitchell being duly sworn deposes and says:

1. I am the Attorney General of the United States.

2. This affidavit is submitted in connection with the government's opposition to the disclosure to the defendant of information concerning the overhearing of a conversation of the defendant which occurred during the course of an electronic surveillance which was being maintained to gather foreign intelligence information.

3. On one occasion, in June, 1965, the defendant participated in a conversation which was overheard by government agents who were monitoring a wiretap which was being maintained for the purpose of gathering foreign intelligence information. [694] Submitted with this affidavit, as sealed Exhibit A for the court's *in camera* examination, is a copy of the log of the overheard conversation and a description of the premises which were the subject of the surveillance. It is apparent from these materials that neither the defendant nor any premises in which he had an interest was the subject of this surveillance and that the surveillance was being conducted to gather foreign intelligence information.

4. The records of the Department of Justice reflect that the installation of this surveillance was expressly approved by the then Attorney General of the United States. Submitted with this affidavit, as sealed Exhibit B for the court's *in camera* examination, is a copy of the memorandum reflecting the

Attorney General's express approval of the installation of this surveillance.

5. I certify that it would prejudice the national interest to disclose the particular facts concerning this surveillance other than to the court *in camera*. Accordingly, Exhibits A and B referred to herein are being submitted solely for the court's *in camera* inspection and copies of those exhibits are not being furnished to the defendant. I would request the court, at the conclusion of its hearing on this matter, to place these exhibits in a sealed envelope and return them to the [695] Department of Justice where they will be retained under seal so that they may be submitted to any appellate court that may review this matter.

/s/ John N. Mitchell
Attorney General of the United States

[Jurat omitted.]

Memorandum From President Roosevelt

THE WHITE HOUSE
WASHINGTON

CONFIDENTIAL May 21, 1940

MEMORANDUM FOR THE ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct to the conversation or other communications of persons suspected of

Memorandum From President Roosevelt

subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

(s) F. D. R.

Memorandum of President Truman

Office of the Attorney General
Washington, D.C.

July 17, 1946.

The President,
The White House,

My dear Mr. President:

Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

> "You are therefore authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to

Memorandum of President Truman

use them in cases vitally affecting the domestic security, or where human life is in jeopardy.

As so modified, I believe the outstanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate at the foot of this letter.

In my opinion, the measures proposed are within the authority of law; and I have in the files of the Department materials indicating to me that my two most recent predecessors as Attorney General would concur in this view.

Respectfully yours,

/s/ Tom C. Clark

Attorney General.

I concur July 17, 1947

/s/ Harry S. Truman

Memorandum of President Johnson

ADMINISTRATIVELY CONFIDENTIAL

THE WHITE HOUSE
WASHINGTON

June 30, 1965

MEMORANDUM FOR THE HEADS
OF EXECUTIVE DEPARTMENTS AND AGENCIES

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

ADMINISTRATIVELY CONFIDENTIAL

Memorandum of President Johnson

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem which raises substantial and unresolved questions of Constitutional interpretation, I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition, such reports shall contain a list of any interceptions currently authorized and the reasons for them.

/s/ Lyndon B. Johnson

Constitutional and Statutory Provisions and Regulations Involved

United States Constitution

Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitutional and Statutory Provisions and Regulations Involved

Amendment XIV, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Communications Act, 47 U. S. C. §605 (Prior to 1968 amendment)

> §605. Unauthorized publication or use of communications
>
> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communica-

tion and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Universal Military Training and Service Act, 50 U. S. C. App. §§451–63 (Prior to the adoption of the Military Service Act of 1967)

§451(c):

The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selec-

tion which is fair and just, and which is consistent with the maintenance of an effective national economy.

§455(a):

The selection of persons for training and service under section 4 [section 454 of this Appendix] shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted: *Provided,* That in the selection of persons for training and service under this title [sections 451–454 and 455–471 of this Appendix], and in the interpretation and execution of the provisions of this title [said sections], there shall be no discrimination against any person on account of race or color . . .

§456(g):

Regular or duly ordained ministers of religion, as defined in this title [sections 451–454 and 455–471 of this Appendix], and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title [said sections].

Constitutional and Statutory Provisions and Regulations Involved

§456(j):

Nothing contained in this title [sections 451–454 and 455–471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under

this title [sections 451-454 and 455-471 of this Appendix]. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) [section 454 (b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title [sections 451–454 and 455–471 of this Appendix].

Constitutional and Statutory Provisions and Regulations Involved

§460(b)(3):

(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title [said sections], together with such other duties as may be assigned under this title [said sections]. He shall create and establish one or more local boards in each county or political subdivision corresponding thereto of each State, Territory, and possession of the United States, and in the District of Columbia. Each local board shall consist of three or more members to be appointed by the President from recommendations made by the respective governors or comparable executive officials . . . . No member of any local board shall be a member of the armed forces of the United States, but each member of any local board shall be a civilian who is a citizen of the United States residing in the county or political subdivision corresponding thereto in which such local board has jurisdiction, and each intercounty local board shall have at least one member from each county or political subdivision corresponding thereto included within the intercounty local board area. Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal

to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title [said sections], of all individuals within the jurisdiction of such local boards. The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. There shall be not less than one appeal board located within the area of each Federal judicial district in the United States and within each Territory and possession of the United States, and such additional separate panels thereof, as may be prescribed by the President. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States and who are not members of the armed forces. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. The President, upon appeal or upon his own motion, shall have power to determine all claims or questions with respect to inclusion for, or exemption or deferment from training and service under this title [said sections], and the determination of the President shall be final. No person who is a civilian officer, member, agent, or employee of the Office of Selective Service Records or the Selective Service System, or of any local board or appeal board or other agency of such Officer or System, shall be excepted from registration or deferred or exempted from training and service, as provided for in this title [said sections], by reason of his status as such civilian officer, member, agent, or employee . . . .

Constitutional and Statutory Provisions and Regulations Involved

§462(a):

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451–454 and 455–471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations or directions made pursuant to this title [said sections], or any person or persons who shall knowingly

hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction shall suffer such punishment as a court martial may direct. . . .

Selective Service Regulations, 32 C. F. R. Part 1600.

1600.735-1 Conduct Requirements in General.—(a) The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by Government employees and special Government employees is essential to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government.

(b) Employees of the Selective Service System shall conduct themselves in such a manner that the work of the System is effectively accomplished; shall be courteous, considerate, and prompt in dealing with or serving the public; and shall conduct themselves in both their official and personal lives in a manner that will not bring discredit or embarrassment to the Selective Service System.

(c) Employees shall observe the applicable laws and regulations governing participation in political activities; avoid any discrimination because of race, color, religion, national origin, or sex; economically utilize, protect, and

conserve Federal property entrusted to them; and conduct all their official activities in a manner which is above reproach and free from any indiscretions or acceptance of gratuities or favors which would cast doubt or suspicion upon themselves or the administration of the Selective Service System.

1604.22 Composition and Appointment.—For each appeal board area an appeal board, normally of five members, shall be appointed by the President, upon recommendation of the Governor. The members shall be male citizens of the United States who are not members of the armed forces or any reserve component thereof; they shall be residents of the area in which their board is appointed; and they shall be at least 30 years old. The appeal board should be a composite board, representative of the activities of its area, and as such should include one member from labor, one member from industry, one physician, one lawyer, and, where applicable, one member from agriculture. . . .

1604.24, Jurisdiction.—The appeal board shall have jurisdiction to review and to affirm or change any decision appealed to it from any local board in its area or any decision appealed from any local board not in its area when such appeal is either transferred to it in the manner provided in these regulations, or is appealed to it by or on behalf of any registrant whose principal place of employment is located in its area or submitted to it in the manner required by law.

1604.52 Composition and Appointment.—(a) A local board of three or more members shall be appointed for

each local board area by the President upon recommendation of the Governor.

(b) A local board of three or more members, with at least one member from each county included within the intercounty local board area, shall be appointed for each intercounty local board area by the President upon recommendation of the Governor.

(c) The members of local boards shall be male citizens of the United States who shall be residents of a county in which their local board has jurisdiction and who shall also, if at all practicable, be residents of the area in which their local board has jurisdiction. No member of a local board shall be a member of the armed forces or any reserve component thereof. Members of local boards shall be at least 30 years of age.

1604.54 Jurisdiction.—The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law.

1622.1 General Principles of Classification.

(b) Classification is the key to selection and it must be accomplished in the spirit of the Military Selective Service Act of 1967, in which the Congress has declared "that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Constitutional and Statutory Provisions and Regulations Involved

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each such registrant shall receive equal justice.

1622.14 Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

Constitutional and Statutory Provisions and Regulations Involved

(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of the Military Selective Service Act of 1967, contains in part the following provisions:

> "SEC. 16. When used in this act— * * * (g) (1) the term 'duly ordained minister of religion' means a per-

son who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."

Constitutional and Statutory Provisions and Regulations Involved

1626.24 Review by Appeal Board.—(a) The appeal board shall consider appeals in the order in which they are received unless otherwise directed by the Director of Selective Service, in which event, they shall be considered in such order as the Director of Selective Service shall prescribe.

(b) In reviewing the appeal and classifying the registrant, the appeal board shall not receive or consider any information other than the following:

(1) Information contained in the record received from the local board.

(2) General information concerning economic, industrial, and social conditions.

(3) Any advisory recommendation from the Department of Justice under section 1626.25.

(4) Any reply to the recommendation of the Department of Justice received from the registrant under section 1626.25.

1626.25 Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall tentatively determine whether or not the registrant is eligible for classification in a class lower than Class I-O or in Class I-O. If the appeal board finds that the registrant is eligible for classification in Class I-O or in a lower class, it shall place him in the appropriate class.

(b) If the appeal board tentatively determines that the registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(c) No registrant's file shall be forwarded to the United States Attorney by any appeal board unless the record on the Classification Questionnaire (SSS Form No. 100) shows and the letter of transmittal states that the appeal board reviewed the file and tentatively determined that the registrant should not be classified in Class I-O or in a lower class. Any file forwarded to the United States Attorney without the information required by this paragraph shall be returned to the appeal board.

(d) Whenever a registrant's file is forwarded to the United States Attorney in accordance with paragraphs (b) and (c) of this section, the Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four

consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

(e) Upon receipt of the recommendation of the Department of Justice, the appeal board shall mail a copy thereof to the registrant together with a letter advising the registrant that, within thirty days after the date of such mailing, he may file with the appeal board a written reply concerning the recommendation of the Department of Justice. Upon receipt of the reply of the registrant or the expiration of the period afforded him to make such reply, whichever occurs first, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but shall not be found to follow, the recommendation of the Department of Justice. The appeal board also shall give consideration to any reply to such recommendation received from the registrant. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant the recommendation of the Department of Justice, a copy of its letter transmitting a copy of such recommendation to the registrant, and any reply to such recommendation received from the registrant.

1627.1 Who May Appeal to the President From Any Determination of an Appeal Board.—(a) When either the State Directors of Selective Service or the Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice, he may appeal to the President from any determination of an appeal board. He may take such an appeal at any time.